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NGIU-KEE CORPORATION (M) BHD & ANOR

v.

PAN-PACIFIC CONSTRUCTION HOLDINGS SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: S-02-372-2006]

C

28 AUGUST 2007

COMPANY LAW: *Member's rights - Oppression - Minority protection - Action under s. 181 of Companies Act 1965 - Conduct that would justify judicial remedy under s. 181 - Question whether there is oppression must be determined according to facts of each case - Petitioner must show that company's affairs are being conducted in an oppressive manner - Nothing to show that acts complained of were designed to injure petitioner's rights as a member - Petitioner raising issue of oppression with intention of wresting control of company - Oppression must be in form of dishonesty*

D

E

COMPANY LAW: *Member's rights - Oppression - Minority protection - Remedies available under s. 181 of Companies Act 1965 - Minority shareholders who should sell their shares to majority shareholders when there has been oppression - Whether unjust to order shareholder holding 70% of paid-up capital to sell their majority shareholding to a minority shareholder*

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Pan-Pacific Construction Holdings Sdn Bhd (the petitioner in the court below) took out the present petition praying for an order that Ngiu-Kee Corporation (the 2nd respondent in the court below) sell their 70% shareholding in Pacific-Ngiu Kee Sdn Bhd (the 1st respondent in the court below) at a fair and commercial price or for the company to be wound up.

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The 1st respondent was a joint-venture company formed pursuant to a joint venture agreement between the petitioner and the 2nd respondent in order for both of them to operate a departmental store and supermarket at Centre Point Sabah ('the premises'). The terms and conditions of the joint venture agreement ('the JVA') provided *inter alia*, that (a) the equity shareholdings in the

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1st respondent shall be held by the petitioner 30% and by the 2nd respondent 70%; (b) the petitioner will appoint 3 Directors and that the 2nd respondent shall appoint 5 Directors in the 1st respondent; (c) a board meeting of the 1st respondent will be held every month; (d) that the 2nd respondent shall be responsible for the management of the Department Store using their knowledge and experience; and (e) all banking facilities required for the 1st respondent shall be obtained from any approved banking institutions. Pursuant to the JVA, the petitioner's wholly owned subsidiary company subleased the premises at a special rent to the 1st respondent. The 1st respondent started trading in the year 1998 and was profitable. There was a material change in the management of the 1st respondent in 2001. The controlling members of the 2nd respondent sold their shares to another group. Thereafter, the 1st respondent consistently posted yearly losses. The petitioner complained of the following: (a) the 1st Respondent's Stock losses of RM775,000; (b) an alleged advance of RM3.78 million to 1st respondent from the 2nd respondent and interest charged on the advance; (c) about the 1st respondent paying the salaries of 3 of the 2nd respondent's senior management staff from the 1st respondent's funds; and (d) that the manager in charge of the 1st respondent's joint venture business was also looking after the affairs of the 2nd respondent's Lawas store. The accumulation of all these problems led to the petitioner to seek legal redress. The learned judge found that the 2nd and 3rd respondents had oppressed the petitioner and therefore made the order that the 2nd respondent sell all its 70% shareholding in the company to the petitioner. The respondents appealed.

Held (allowing the appeal by the 2nd and 3rd respondents and dismissing the petitioner's petition with costs)
Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) Since the 2nd respondent was a public listed company the minority shareholding of the company would keep changing as and when its shares were traded. The petitioner knew of this fact before entering into the JVA. The petitioner raised the issue of oppression and disregard of the interests of the minority shareholders in order to wrest control of the 1st respondent. From the facts it could be seen that the intention of the petitioner was to take over the 1st respondent. (paras 15 & 19)

(2) There are four broad classes of conduct that would justify judicial remedy under s. 181 of the Companies Act, namely: (a) oppressive conduct; (b) conduct in disregard of interests; (c) unfairly discriminatory conduct; or (d) prejudicial conduct. The question whether there is oppression, disregard, unfair discrimination, or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case. (paras 21 & 22)

(3) In Malaysia the authorities show it is the minority shareholders who should sell their shares to the majority shareholders when they have shown that they have been oppressed or the majority shareholders have disregarded the minority shareholders. The disparity shareholding between the parties was so great that it would create total injustice to the 2nd respondent holding 70% of the paid-up capital in the 1st respondent to sell their majority shareholding to the petitioner. Anyway, the petitioner failed to prove oppression or disregard of its interest by the 2nd respondent. If the petitioner had proved oppression or disregard of its interest, the fair order should be for the petitioner to sell their shares to the 2nd respondent and not otherwise. (paras 46 & 47)

(4) For the petitioner to succeed in his application for the said reliefs, he must show that it was the affairs of the company which were being conducted in an oppressive manner, and that the respondent company had oppressed the minority shareholders which in this case is the petitioner. On the whole, the circumstances and matters complained of by the petitioner did not at all denote that there was oppression within the meaning of s. 181(1) of the Act. There was nothing to show that the 2nd and 3rd respondents' action complained of was designed to injure the petitioner in its rights as a member. Oppression must be in the form of dishonesty and in the instant case, there was none. (para 48)

Bahasa Malaysia *Translation Of Headnotes*

Pan-Pacific Construction Holdings Sdn Bhd (pempetisyen di mahkamah di bawah) telah memulakan petisyen di sini untuk perintah bahawa Ngiu-Kee Corporation (responden kedua di mahkamah di bawah) menjual 70% dari pegangan sahamnya di dalam Pacific-Ngiu Kee Sdn Bhd (responden pertama di mahkamah di bawah) pada kadar harga komersial yang patut atau supaya syarikat tersebut digulung.

Responden pertama adalah sebuah syarikat usahasama yang ditubuhkan di bawah satu Perjanjian Usahasama di antara pempetisyen dan responden kedua bagi tujuan mengendalikan sebuah gedung perniagaan dan pasaraya di Centre Point Sabah ('premis tersebut'). Antara lain, terma dan syarat Perjanjian Usahasama ('JVA') memperuntukkan bahawa (a) Pempetisyen akan memegang 30% ekuiti di dalam responden pertama sementara 70% lagi dipegang oleh responden kedua; (b) 3 Pengarah responden pertama dilantik oleh pempetisyen sementara 5 Pengarah akan dilantik oleh responden kedua; (c) mesyuarat lembaga pengarah responden pertama akan diadakan pada setiap bulan; (d) dengan menggunakan pengetahuan dan pengalamannya, responden kedua akan bertanggungjawab ke atas pengurusan gedung pasaraya; dan (e) semua kemudahan perbankan yang diperlukan untuk responden pertama hendaklah diperolehi dari institusi bank yang diluluskan. Berdasarkan JVA, sebuah syarikat yang dimiliki sepenuhnya oleh pempetisyen telah memajak premis kepada responden pertama pada satu kadar sewa yang istimewa. Pada tahun 1988, responden pertama memulakan perniagaan dan telah merekodkan keuntungan dalam perniagaannya. Pada tahun 2001, pengurusan responden pertama telah mengalami perubahan pengurusan yang material, di mana ahli-ahli responden kedua yang menguasai syarikat telah menjual kepentingan-kepentingan mereka kepada satu kumpulan lain. Berikutnya, responden pertama mengalami kerugian tahun demi tahun. Akibatnya, pempetisyen membantah terhadap perkara-perkara berikut, iaitu: (a) kerugian saham responden pertama sebanyak RM775,000; (b) pendahuluan sebanyak RM3.78 juta kepada responden pertama oleh responden kedua dan faedah yang dikenakan ke atasnya; (c) tindakan responden pertama menggunakan dananya untuk membayar gaji 3 pegawai pengurusan kanan responden kedua; (d) pengurus yang bertanggungjawab terhadap perniagaan usahasama responden pertama juga bertanggungjawab untuk menjaga gedung perniagaan responden kedua di Lawas. Pengumpukan masaalah-masaalah ini telah membawa pempetisyen untuk menuntut penyelesaian di sisi undang-undang. Yang arif hakim mendapati bahawa responden-responden kedua dan ketiga telah menindas pempetisyen dan dengan itu telah memerintahkan supaya responden kedua menjual kesemua 70% pegangan sahamnya di dalam syarikat kepada pempetisyen. Responden-responden merayu.

A B C D E F G H I

Diputuskan (membenarkan rayuan responden-responden kedua dan ketiga dan menolak petisyen pempetisyen dengan kos)

Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana responden kedua adalah sebuah syarikat awam maka pemegangan saham minoriti syarikat akan terus berubah apabila saham-sahamnya diniagakan. Pempetisyen menyedari hakikat ini sebelum memasuki JVA. Pempetisyen membangkitkan isu penindasan serta ketidak-endahan kepentingan pemegang saham minoriti untuk tujuan menguasai responden pertama. Berdasarkan fakta, dapat dilihat bahawa tujuan pempetisyen adalah untuk mengambilalih responden pertama.

(2) Terdapat empat bentuk tatalaku yang menjustifikasikan remedi kehakiman di bawah s. 181 Akta Syarikat, iaitu: (a) perilaku yang menindas; (b) perilaku yang tidak mengendahkan kepentingan-kepentingan; (c) perilaku yang mendiskriminasi secara tidak adil; atau (d) perilaku yang memprejudis. Persoalan sama ada wujud penindasan, ketidak-endahan, diskriminasi tidak adil atau sama ada perbuatan yang disungutkan itu memprejudiskan adalah persoalan yang perlu ditentukan mengikut fakta sesuatu kes.

(3) Di Malaysia, autoriti-autoriti menunjukkan bahawa pemegang-pemegang saham minoritilah yang sepatutnya menjual saham-saham mereka kepada pemegang-pemegang saham majoriti apabila terbukti bahawa mereka telah ditindas atau bilamana kepentingan-kepentingan mereka sudah tidak diendahkan oleh pemegang-pemegang saham majoriti. Perbezaan pegangan saham di antara pihak-pihak adalah amat besar sehinggakan ia menjadi satu ketidakadilan total kepada responden kedua yang memegang 70% dari saham berbayar responden pertama untuk menjual pegangan majoriti mereka kepada pempetisyen. Apapun, pempetisyen gagal membuktikan penindasan atau ketidak-endahan kepentingan-kepentingannya oleh responden kedua. Jika pempetisyen berjaya membuktikan penindasan atau ketidak-endahan kepentingannya, perintah yang adil adalah bagi pempetisyen menjual saham-saham mereka kepada responden kedua dan tidak sebaliknya.

(4) Untuk berjaya dalam permohonan relif-relifnya di sini, pempetisyen harus membuktikan bahawa urusan-urusan syarikat telah diurus dengan secara menindas, dan bahawa syarikat responden telah menindas pemegang-pemegang saham minoriti yang mana dalam kes ini adalah pempetisyen sendiri. Pada keseluruhannya, halperkara dan keadaan yang disunguti oleh pempetisyen langsung tidak membayangkan apa-apa penindasan seperti yang dimaksudkan oleh s. 181(1) Akta. Tiada suatu apapun yang menunjukkan bahawa perilaku responden-responden kedua dan ketiga bertujuan untuk menjejaskan hak-hak pempetisyen sebagai seorang ahli. Penindasan harus wujud dalam bentuk suatu ketidak-jujuran di mana, dalam kes ini, ia tidak wujud.

Case(s) referred to:

Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors [1994] 1 CLJ 157 HC ***(refd)***

Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd [1995] 1 LNS 317 HC ***(refd)***

Edmund Charles Liebenberg v. ICB-Griffin Manufacturing Sdn Bhd & Ors [2005] 3 CLJ 613 HC ***(refd)***

Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors [1998] 3 CLJ Supp 126 HC ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 1 LNS 73 HC ***(refd)***

Lee Chee Onn v. Lee Keng Soon & Anor [1994] 3 CLJ 461 HC ***(refd)***

Liew Teck Fook v. Chan Yip Pooi & Ors [2005] 5 CLJ 20 HC ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 2 MLJ 227 ***(refd)***

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 ***(refd)***

Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors [2004] 6 CLJ 174 HC ***(refd)***

Ting Teck Sie v. Wong Sen Chiew & Ors [2005] 6 CLJ 495 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181(1)

For the petitioner - Lim Pitt Kong; M/s PK Lim & Co
For the respondents - Dr David Fung; M/s Alex Pang & Co

[Appeal from High Court, Kota Kinabalu; Companies No: K 26-01-2004]

Reported by Amutha Suppayah

A

JUDGMENT

Mokhtar Sidin JCA:

[1] Pan-Pacific Construction Holdings Sdn Bhd, the petitioner in the court below, took out the present petition praying for an order that Ngiu-Kee Corporation (the 1st appellant) sell their 70% shareholding in Pacific-Ngiu Kee Sdn Bhd (the 1st respondent in the court below) at a fair and commercial price or for the company to be wound up. The 1st appellant was the 2nd respondent in the court below while the 2nd appellant was the 3rd respondent in the court below. To avoid any confusion we will refer to the parties as they were in the court below.

[2] The petition, *inter alia*, states:

THE RESPONDENTS

1. The 1st Respondent was incorporated on 24 June 1998 under the Companies Act, 1965 (Act 125) with its registered office at Basement Floor, Centre Point Sabah, No. 1, Jalan Centre Point, 88000 Kota Kinabalu, Sabah, Malaysia.

2. The authorized share capital of the 1st Respondent is divided into 5,000,000 ordinary shares of RM1.00 each and the issued and fully paid up capital of the 1st Respondent is divided into 3,000,000 ordinary shares of RM1.00 each.

3. Ngiu Kee Corporation (M) Bhd, the 2nd Respondent, is a public company listed on the Second Board of the Kuala Lumpur Stock Exchange and has its registered office at Lot LG03, G04B2 & 1.03 Wisma Saberkas, Jalan Tun Abang Haji Openg, 93000 Kuching, Sarawak.

4. The 2nd Respondent's group corporate structure shows that it has numerous other wholly owned subsidiary companies operating as departmental stores and/or supermarket stores.

5. The 3rd Respondent, Ms Yong Siew Kat, is the Chief Executive Officer of the 2nd Respondent and a director of the 1st Respondent.

THE HISTORICAL BACKGROUND OF 1st RESPONDENT

6. The 1st Respondent is in essence a joint-venture company and was formed in order for both the Petitioner and the 2nd Respondent to operate a departmental store and supermarket

at the lower ground, ground, first and second floors, measuring altogether approximately 112,577 sq ft, of a multi-purpose complex called Centre Point Sabah ("the Premises").

7. The formation of the 1st Respondent was pursuant to a Joint Venture Agreement in writing entered into on 10 July 1998 between the Petitioner and the 2nd Respondent.

8. The terms and conditions of the Joint Venture Agreement to operate the departmental store and supermarket under corporate umbrella of the 1st Respondent, *inter alia*, are as follows:

2.1 Joint Venture

The parties mutually agree to form the Company to enter into a joint venture:

2.1:1 to set up and operate the Department Store at the Premises;

2.1:2 to enter into the Sublease for the Premises and to purchase the Assets from SUNYAP DEVELOPMENT SDN BHD; and

2.1:3 to carry out the obligations mutually agreed by each party under this agreement.

PROVIDED THAT the value of the Assets to be purchased from SUNYAP DEVELOPMENT SDN BHD shall be agreed between the parties or shall be determined by an independent valuer if the parties cannot agree.

2.2 Shareholdings

Unless otherwise agreed the parties shall ensure that the equity shareholdings in the Company shall be held by them in the following proportions:

PAN PACIFIC	30%
NGIU KEE	70%'

2.3 Directors, Company Secretary etc

2.3:1 unless otherwise agreed the parties shall be entitled to appoint and maintain the following number of Directors (including a Chairman and a Managing Director) on the Board of Directors:

PAN PACIFIC	3 Directors (1 of whom shall be appointed as the Chairman)
NGIU KEE	5 Directors (1 of whom shall be appointed as the Managing Director).

2.6 Management Committee

A meeting for Management Committee comprising of three (3) representatives from NGIU KEE who shall be the Managing Director, an Executive Director and the Financial Controller and two (2) representatives from PAN PACIFIC shall be held every month in respect of the management of the Business of the Company. The chairman for all such meetings shall be the Managing Director or in his absence shall be chosen from one of the members present.

3 Business of the Company

3.1 The business of the Company shall unless and until the parties otherwise agree be confined to the Joint Venture.

3.2 NGIU KEE shall be responsible for the management of the Department Store using their knowledge and experience and shall be entitled to call upon the advice and support from PACIFIC CONSTRUCTION CO LTD, Republic of China, as and when the need arises.

4.4 Banking facilities, additional finance

4.4:1 All banking facilities required for the Company shall be obtained from any approved banking institutions on terms favourable to the Company.

4.4:2 Any additional finance required by the Company may be advanced by the parties subject to the prevailing banking interest rate for overdraft facilities/ term loan facilities to be agreed between the Shareholders.

9. In accordance with the terms of the Joint Venture Agreement the principal objects of the 1st Respondent for which it was established are as follows:

Under Article 3 of the Memorandum of Association

(A) To carry on the business as departmental stores owner, importing, exporting, buying, selling, manufacturing and otherwise dealing in textiles, products and accessories for textiles, all kinds of leather goods, toys, real and imitation jewellery and all kinds of cosmetics, costumes, clothing, lingeries, hats, boots, shoes, home appliances, kitchen wares, perfumes, artificial and natural flowers and all kinds of goods, wares and merchandise which can be displayed and sold in departmental stores.

(B) To carry on the business of supermarket owners, cold-storage keepers, general merchants and dealers in canned goods, foodstuffs, provisions, rice, sugar, salt, cereals, fruits, vegetables, fish, meats, produces, goods and articles of every kind and description whether raw, fresh, preserved or manufactured and to barter, exchange, manipulate and prepare for market or otherwise deal in such products and goods.

and other objects stated in the Memorandum of Association of the 1st Respondent.

10. In accordance with the Joint Venture Agreement the Petitioner was issued and allotted 900,000 shares of RM1.00 each comprising 30% of the total shareholding and the 2nd Respondent was issued and allotted 2,100,000 shares of RM1.00 each comprising 70% of the total shareholding in the 1st Respondent.

11. The appointments to the board of directors of the 1st Respondent were also duly made.

12. Pursuant to the Joint Venture Agreement the Petitioner's wholly owned subsidiary company, Sunyap Development Sdn Bhd (Co. No. 67231-M) also subleased the Premises at a special rent to the 1st Respondent.

13. The 1st Respondent started trading in the year 1998 and for the seven (7) months of trading before year end in December had made a profit.

14. The 1st Respondent continued to be profitable for year 1999.

15. There was a material change in the management of the 1st Respondent in the first quarter of year 2001. The controlling members of the 2nd Respondent sold their shares to another group.

16. A dispute arose between the Petitioner and the 2nd Respondent under the Joint Venture Agreement under clause 8.2:3 of the Joint Venture Agreement, for there was a change in the control or ownership of a party to the joint venture without prior consent from the other party.

The Petitioner issued a notice to terminate the Joint Venture Agreement and to buy over the shares in the 1st Respondent from the 2nd Respondent as provided under clause 8.3:1 of the Joint Venture Agreement.

17. There then arose offers and counteroffers to sell and buy their respective shares in the 1st Respondent between the Petitioner and the 2nd Respondent. An originating summons No. K24-205 of 2001 was filed with the High Court at Kota Kinabalu to determine whether there was a legally binding agreement for the sale of the shares.

18. Eventually the dispute was settled amicably out of court and the originating summons was discontinued.

19. The settlement between the Petitioner and the 2nd Respondent was concluded on 17 August 2001, which agreed intention was for the Joint Venture between them to continue upon additional terms and conditions contained in the minutes of meeting. The important additional terms and conditions, *inter alia*, were as follows:

(1) The equity of the Petitioner and 2nd Respondent will remain in the same proportion, 30% and 70% respectively, in the 1st Respondent.

(2) With effect from 1 July 2001 the rental rate for the Premises shall be fixed at RM202,638.60 per month representing 112,577 sq ft at RMl.80 per sq ft, and the same rental rate is agreed for 8 days per annum for special sales (ie for these number of days rental shall not be based on the sales turnover as provided under the Sublease Agreement dated 14 September 2000); and

(3) The 2nd Respondent is entitled to collect 1% of the 1st Respondent's turnover to defray the 2nd Respondent's headquarters overhead (the Management Fee).

THE FIDUCIARY RELATIONSHIP BETWEEN PETITIONER AND 2nd RESPONDENT

20. By virtue of the Joint Venture relationship between the Petitioner and the 2nd Respondent they are partners, or akin to partners in the joint venture business carried out under the corporate umbrella of the 1st Respondent.

21. The Petitioner had reposed trust and confidence in the 2nd Respondent in managing the day-to-day operations of the joint venture business. However, the Petitioner as the partner has a right and expectation to give its input in the management of the joint venture business through the management committee of the 1st Respondent. The accounts of the 1st Respondent should also be readily available to the Petitioner.

22. Insofar as the general management of the 1st Respondent is concerned, the Petitioner would rely on the 2nd Respondent to act and conduct itself in a position and manner befitting that of a fiduciary whom it had reposed trust and confidence. The Petitioner had expected the 2nd Respondent not to act in a way and manner that there would be a conflict of duty and interest with that of the Petitioner's rights and interest in the joint venture business.

23. There was also the board of directors meeting that the Petitioner's representatives could expect to resolve any problems or complaints with regard to the management of the affairs of the 1st Respondent.

PROBLEMS AND COMPLAINTS IN RESPECT OF AFFAIRS AND CONDUCT OF THE 1ST RESPONDENT

24. The Petitioner as the partner who has combined with the 2nd Respondent in the joint venture business would naturally expect a return for its efforts and investment in the business. So after the 1st Respondent has consistently posted yearly losses since year 2000 the Petitioner's representatives at the board of directors meeting on 17 November 2003 raised this point and commented that the previous management in years 1998 and 1999 had made a profit.

25. The response of the 2nd Respondent through its corporate group chief executive officer, the 3rd Respondent, that "the Company has been losing money since day one and that the old management together with the auditors misrepresented the accounts of the Company to reflect profit making position in the initial years" was a shock to the Petitioner.

26. Even more shocking was the subsequent acts of the 2nd and 3rd Respondent in trying to eradicate this statement from the minutes of board of directors meeting by saying that they have no evidence of such matter and in the process even implicating the Petitioner's Taiwan members.

27. The chairman of the board of directors meeting responded by saying that what was clearly stated by her in direct answer to a director's question should remain as the true record of the proceedings.

28. At this very board of directors meeting there were various other complaints brought up by the Petitioner for resolution, namely:

(1) 1st Respondent's Stock losses of RM775,000.00;

(2) Alleged advance of RM3.78 million as at 31 May 2003 to 1st Respondent from the 2nd Respondent as mentioned in the board of directors meeting on 18 June 2003; and

(3) Interest charged on the advance.

29. Besides these complaints there was also the serious matter of the 1st Respondent paying the salaries of three (3) of the 2nd Respondent's senior management staff based at Kuala Lumpur, namely Lim Poo Chin, Yeap Siew Cheng and Ho Eng Wah from the 1st Respondent's funds. The Petitioner queried this matter and there was no adequate resolution of this matter at the board of directors meeting on 6 September 2002,

30. The Petitioner found out towards the end of last year that the manager in charge of the 1st Respondent's joint venture business was also looking after the affairs of the 2nd Respondent's Lawas store.

31. The accumulation of all these problems, which are symptomatic of the way the 2nd Respondent conducted the affairs of the 1st Respondent, had persuaded the Petitioner to seek legal redress.

32. The Petitioner's solicitors Messrs Alex Pang & Co sent a notice of demand dated 7 January 2004 listing their complaints to the 2nd Respondent and copied it to the 1st Respondent.

33. The 2nd Respondent through its solicitors in Kuala Lumpur Messrs A. Nathan & Isa Aziz Ibrahim replied in their letter dated 20 January 2004 confirming the previously suspected view that the relationship of fiduciary between the Petitioner and the 2nd Respondent is in reality at an end. What is most outrageous is that the 2nd Respondent attempted to justify the clear and blatant abuse of the 1st Respondent's funds to pay the three (3) employees of the 2nd Respondent.

34. This was and is a clear breach of the fiduciary duty not to be placed in a situation of conflict of duty and interest.

35. The Petitioner responded by its solicitors' letter dated 11 February 2004. In the letter, the Petitioner made the point, *inter alia*, that breaches of fiduciary duties to one's partner, one instance of which the 2nd Respondent had admitted, should not be trivialized, and that the 2nd Respondent's response confirmed that the collaborative relationship of trust and confidence between them had come to an end.

36. The Petitioner is aggrieved by the 2nd and 3rd Respondents' conduct which constitutes oppressive conduct or unfair disregard of the Petitioner's interest as a member and joint venture partner. Further or alternatively, such conduct is unfairly discriminatory or unfairly prejudicial against the Petitioner.

37. The 2nd and 3rd Respondents' conduct has destroyed any confidence and trust the Petitioner once had in the 2nd Respondent as its co-member and joint venture partner in the joint venture business operated under the 1st Respondent.

38. The 2nd Respondent's breaches of fiduciary duties not to act in conflict with its duty to the Petitioner and against the Petitioner's interest strike at the heart of the relationship between the Petitioner and the 2nd Respondent, which is one of mutual trust and confidence. Without such trust and confidence the Petitioner finds it impossible to carry on the joint venture business with the 2nd Respondent. It would be unfair to expect the Petitioner to carry on the joint venture business with the 2nd Respondent as its partner, for the relationship of trust and confidence between them had in reality come to an end.

39. For the reasons given above, the Petitioner humbly petitions to this Honourable Court for protection and relief under section 181 of the Companies Act, 1965.

The Petitioner therefore prays as follows:

(1) That the 2nd Respondent may be ordered to sell all its shares in the 1st Respondent to the Petitioner at a fair and commercial price to be determined by a firm of auditors namely Messrs Ernst & Young or such other firm of auditors to be appointed by this Honourable Court;

OR

(2) That the 1st Respondent may be wound up; AND

(3) That representative(s) from the Petitioner verifies and countersigns the receipt of each consignment of goods or stock purchased by the 1st Respondent;

AND

(4) That representative(s) from the Petitioner countersigns each and every cheque for the payment of each consignment of goods or stock purchased by the 1st Respondent; AND

(5) That this Honourable Court may declare that the 2nd Respondent has breached its fiduciary duties not to act in conflict with its duty to the Petitioner and against the Petitioner's interest in that the 2nd Respondent has breached its fiduciary duties not to act in conflict with its duty to the Petitioner and against the Petitioner's interest in that the 2nd Respondent had allowed the interest, bank and penalty charges to be charged by its subsidiary or related company Maestro Products Sdn Bhd against the 1st Respondent; AND

(6) That this Honourable Court may declare that the 2nd Respondent has breached its fiduciary duties not to act in conflict with its duty to the Petitioner and against the Petitioner's interest in that the 2nd Respondent had abused its power by using the 1st Respondent's money to pay the salaries including bonuses, income taxes, Employee Provident Fund Contributions and any other contributions of the above-referred three (3) employees of the 2nd Respondent resident in Kuala Lumpur; AND

(7) That this Honourable Court may declare that the 2nd Respondent has breached its fiduciary duties not to act in conflict with its duty to the Petitioner and against the

Petitioner's interest in that the 2nd Respondent had abused its power by using the 1st Respondent's money to pay the salaries including bonuses, income taxes, employee provident fund contributions and any other contributions of the above-referred accounts staff of the 2nd Respondent working in its Lawas store; AND

(8) That this Honourable Court may declare that the 3rd Respondent has breached the fiduciary duty she owed to the 1st Respondent as the director responsible for implementing, allowing or permitting the breaches of fiduciary duties stated in paragraphs (5) to (7) above; AND

(9) That the 3rd Respondent may be ordered to pay damages for any damage or loss sustained by the 1st Respondent because of the 3rd Respondent's conduct; AND

(10) That the 2nd Respondent cause its subsidiary or related company Maestro Products Sdn Bhd to withdraw and cancel all the unlawful interest, bank and penalty charges charged on the 1st Respondent;

AND

(11) That the 2nd Respondent render restitution to the 1st Respondent of all the payments of salaries including bonuses, income taxes, employee provident fund contributions and any other contributions paid for and on behalf of the abovereferred three (3) employees of the 2nd Respondent residing in Kuala Lumpur; AND

(12) That the 2nd Respondent render restitution to the 1st Respondent of all the payments of salaries including bonuses, income taxes, employee provident fund contributions and any other contributions paid for and on behalf of the accounts staff of the 2nd Respondent's working in its Lawas store; AND

(13) That an injunction be granted to restrain the 2nd Respondent, whether by itself or by its servants or agents or otherwise howsoever from using abovereferred accounts staff to do any work for or in relation to the 2nd Respondent's Lawas store or any other of its other stores save for the 1st Respondent;

AND

(14) That such other order may be made as this Honourable Court thinks fit or just; AND

(15) Costs to be paid to the Petitioner by the 2nd and 3rd Respondents jointly and severally.

[3] The 2nd and 3rd respondents gave notice of intention to appear on the petition. By a notice of motion dated 9 July 2004 the 2nd and 3rd respondents applied to strike out the petitioner's petition. The motion, *inter alia*, states:

1. the Petition dated 3rd March 2004 filed herein be struck out pursuant to the inherent jurisdiction of this Honourable Court for

   i. failure to disclose any reasonable cause of action;

   ii. alternatively, for being an abuse of the process of this Honourable Court:

2. further or other relief that this Honourable Court deems fit and appropriate;

3. costs of and occasioned by this application and the Petition be borne and paid by the Petitioner,

The reasons behind this application are as follows:

1. the Petition does not disclose any reasonable cause of action against the 2nd and 3rd Respondents;

2. the Petition does not comply with the requirements and provisions of Section 181 of the Companies Act 1965;

3. the Petition does not fall within the confines of Section 181 of the Companies Act 1965;

4. this application is further supported by the Affidavit in Opposition of the Petition of the 2nd and 3rd Respondents affirmed by Yong Siew Kat on 6th July 2004.

[4] On 29 October 2004, the learned judge dismissed the motion by the 2nd and 3rd respondents.

[5] Before the hearing of the petition the parties filed a statement of agreed facts which read as follows:

STATEMENT OF AGREED FACTS

THE RESPONDENTS

1. The 1st Respondent was incorporated on 24 June 1998 under the Companies Act, 1965 (Act 125) with its registered office at Basement Floor, Centre Point Sabah, No. 1, Jalan Centre Point, 88000 Kota Kinabalu, Sabah, Malaysia.

2. The authorized share capital of the 1st Respondent is divided into 5,000,000 ordinary shares of RM1.00 each and the issued and fully paid up capital of the 1st Respondent is divided into 3,000,000 ordinary shares of RM1.00 each.

3 Ngiu Kee Corporation (M) Bhd, the 2nd Respondent, is a public company listed on the Second Board of the Kuala Lumpur Stock Exchange and has its registered office at Lot LG03, G04B2 & 1.03 Wisma Saberkas, Jalan Tun Abang Haji Openg, 93000 Kuching, Sarawak.

4. The 2nd Respondent's group corporate structure shows that it has numerous other wholly owned subsidiary companies operating as departmental stores and/or supermarket stores.

5. The 3rd Respondent, Ms Yong Siew Kat, is the Chief Executive Officer of the 2nd Respondent and a director of the 1st Respondent.

THE HISTORICAL BACKGROUND OF 1ST RESPONDENT

6. The 1st Respondent is in essence a joint-venture company and was formed in order for both the Petitioner and the 2nd Respondent to operate a departmental store and supermarket at the lower ground, ground, first and second floors, measuring altogether approximately 112,577 sq ft, of a multi-purpose complex called Centre Point Sabah ("the Premises").

7. The formation of the 1st Respondent was pursuant to a Joint Venture Agreement in writing entered into on 10 July 1998 between the Petitioner and the 2nd Respondent.

8. The terms and conditions of the Joint Venture Agreement to operate the departmental store and supermarket under corporate umbrella of the 1st Respondent, *inter alia*, are as follows:

2.1 Joint Venture

The parties mutually agree to form the Company to enter into a joint venture:

2.1:1 to set up and operate the Department Store at the Premises;

2.1:2 to enter into the Sublease for the Premises and to purchase the Assets from SUNYAP DEVELOPMENT SDN BHD; and

2.1:3 to carry out the obligations mutually agreed by each party under this agreement.

PROVIDED THAT the value of the Assets to be purchased from SUNYAP DEVELOPMENT SDN BHD shall be agreed between the parties or shall be determined by an independent valuer if the parties cannot agree.

2.2 Shareholdings

Unless otherwise agreed the parties shall ensure that the equity shareholdings in the Company shall be held by them in the following proportions:

PAN PACIFIC	30%
NGIU KEE	70%

2.3 Directors, Company Secretary etc

2.3.1 Unless otherwise agreed the parties shall be entitled to appoint and maintain the following number of Directors (including a Chairman and a Managing Director) on the Board of Directors:

PAN PACIFIC	3 Directors (1 of whom shall be appointed as the Chairman)
NGIU KEE	5 Directors (1 of whom shall be appointed as the Managing Director)

2.6 Management Committee

A meeting for Management Committee comprising of three (3) representatives from NGIU KEE who shall be the Managing Director, an Executive Director and the

Financial Controller and two (2) representatives from PAN PACIFIC shall be held every month in respect of the management of the Business of the Company. The chairman for all such meetings shall be the Managing Director or in his absence shall be chosen from one of the members present.

3. Business of the Company

3.1 The business of the Company shall unless and until the parties otherwise agree be confined to the Joint Venture.

3.2 NGIU KEE shall be responsible for the management of the Department Store using their knowledge and experience and shall be entitled to call upon the advice and support from PACIFIC CONSTRUCTION CO LTD, Republic of China, as and when the need arises.

4.4 Banking facilities, additional finance

4.4.1 All banking facilities required for the Company shall be obtained from any approved banking institutions on terms favourable to the Company.

4.4.2 Any additional finance required by the Company may be advanced by the parties subject to the prevailing banking interest rate for overdraft facilities/term loan facilities to be agreed between the Shareholders.

9. In accordance with the terms of the Joint Venture Agreement the principal objects of the 1st Respondent for which it was established are as follows:

Under Article 3 of the Memorandum of Association

(A) To carry on the business as departmental stores owner, importing, exporting, buying, selling, manufacturing and otherwise dealing in textiles, products and accessories for textiles, all kinds of leather goods, toys, real and imitation jewellery and all kinds of cosmetics, costumes, clothing, lingeries, hats, boots, shoes, home appliances, kitchen wares, perfumes, artificial and natural flowers and all kinds of goods, wares and merchandise which can be displayed and sold in departmental stores.

A

(B) To carry on the business of supermarket owners, cold-storage keepers, general merchants and dealers in canned goods, foodstuffs, provisions, rice, sugar, salt, cereals, fruits, vegetables, fish, meats, produces, goods and articles of every kind and description whether raw, fresh, preserved or manufactured and to barter, exchange, manipulate and prepare for market or otherwise deal in such products and goods.

B

And other objects stated in the Memorandum of Association of the 1st Respondent.

C

10. In accordance with the Joint Venture Agreement the Petitioner was issued and allotted 900,000 shares of RM1.00 each comprising 30% of the total shareholding and the 2nd Respondent was issued and allotted 2,100,000 shares of RM1.00 each comprising 70% of the total shareholding in the 1st Respondent.

D

11. The appointments to the board of directors of the 1st Respondent were also duly made.

12. Pursuant to the Joint Venture Agreement the Petitioner's wholly owned subsidiary company, Sunyap Development Sdn Bhd (Co. No. 67231-M) also subleased the Premises at a special rent to the 1st Respondent.

E

THE FIDUCIARY RELATIONSHIP BETWEEN THE PETITIONER AND THE 2ND RESPONDENT

F

13. The joint venture relationship between the Petitioner and the 2nd Respondent was akin to partners in a joint venture business under the corporate umbrella of the 1st Respondent.

THE AFFAIRS AND CONDUCT OF THE 1ST RESPONDENT

G

Alleged Advance of RM3.78 million by the 2nd Respondent and the interests charged.

14. The issue of the alleged advance of RM3.78 was first brought up to the board of directors at its meeting on 18.6.2003 that as at 31.5.2003 the Ngiu Kee Group (of which the 2nd Respondent is a part of) had advanced an amount of RM3.78 million to the 1st Respondent for the repayment to its suppliers. This issue was subsequently addressed at the board of directors meeting of the 1st Respondent on 26.9.2003.

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15. It was then unanimously agreed on 17.11.2003 by the entire board of directors of the 1st Respondent, which included both the representatives of the Petitioner and the 2nd Respondent that the management of the 1st Respondent be instructed to request the proposed auditors to include the verification of the said advance of RM3.78 million and the alleged stock losses as part and parcel of the forthcoming annual audit for the financial year ending 31.12.2003 subject to a fee which is acceptable to the board of directors, and if the fee is too high, another independent audit firm to be agreed upon by the parties be appointed.

16. Messrs Ernst and Young were appointed to prepare an independent audit report entitled "Report on Verifications of Stock Loss and Advances from Ngiu Kee Sdn Bhd" which was completed on 17.9.2004.

In addition the parties agreed that the issues for the trial are as follows:

AGREED ISSUES FOR TRIAL

1. Whether the matters complained of by the Petitioner constituted a breach or breaches of the fiduciary duty or duties owed to the Petitioner by the 2nd Respondent in the operation of the 1st Respondent's affairs or business?

2. If so, whether such breach or breaches of fiduciary duty falls within the scope of Section 181(1)(a) or (b) of the Companies Act, 1965, to constitute oppressive conduct or unfair disregard of the Petitioner's interest as a member and joint venture partner, or is unfairly discriminatory or unfairly prejudicial against the Petitioner?

3. How should the Court bring to an end or remedy the matters complained of?

[6] Although the agreed issues for trial are as stated above, it is clear to us that the order that the petitioner prayed for is:

(1) That the 2nd respondent may be ordered to sell all its shares in the 1st respondent to the petitioner at a fair and commercial price to be determined by a firm of auditors namely Messrs Ernst & Young or such other firm of auditors to be appointed by this Honourable Court;

OR

(2) That the 1st respondent may be wound up.

[7] The application by the petitioner to wind up the 1st respondent is under s. 181 of the Companies Act 1965. Section 181 of the Companies Act provides:

> 181. Remedy in cases of an oppression.
>
> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to subsection (2) (e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

[8] We believe that the authority to wind up a company on the ground of oppression is *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors. v. Ling Beng Sung* [1978] 2 MLJ 227. The respondent in that case had applied by originating summons in his capacity as a member of the first appellant company for a number of orders the gist of which was that the second and third appellants be removed from office as managing director and director respectively and a receiver and manager be appointed to conduct the company's affairs and for repayment of various sums alleged to have been disposed of wrongfully or without proper authorization. There was an alternative relief asked for that the company be wound up. The company was a family company in which the elder brothers (the second and third appellants) were the majority shareholders. The respondent and two younger brothers were minority shareholders. It was alleged that the second and third appellants had committed breaches of their powers as directors of the company and in particular complaint was made relating to: (a) the purchase and outfitting of a motor yacht, Berjaya Malaysia; (b) loan to Encik Harun Ariffin; (c) donations to political parties; (d) advances to and investments in joint ventures; (e) drawing by the second and third appellants from the company's funds, and (f) remuneration

paid to the second appellant as managing director. It appeared that after inquiries were made by the respondent many of the acts of the second and third appellants were validated by resolutions of the company. The learned trial judge dismissed the application but on appeal the Federal Court ([1976] 1 MLJ 59) held: (a) that the purchase by the second appellant of the yacht, Berjaya Malaysia was misuse of the company's funds and the moneys which he had paid out or for which he had himself reimbursed from the company's funds in respect of the donations to political parties were improperly paid. The second appellant should therefore take over the Berjaya Malaysia and pay to the company all the money spent on it and also pay the company the amount of donations paid to the political parties; (b) that in order to protect the minority shareholders in this case the court would order: (i) that one of the younger brothers be appointed director to safeguard their interests; (ii) that donations be made in future only with the prior approval of the board of directors; (iii) that no bank account be operated without the signatures of two directors, one of whom shall be other than the elder brothers, ie, the majority shareholders; (iv) that no moneys be drawn by any of the directors without the prior approval of the Board; (v) that the power delegated to the first respondent to make investments on behalf of the company be cancelled; (vi) that three clear days' notice be given in writing of any directors' meetings, and (vii) that the bonus for the directors in future be 2% of the nett profits and that no bonus be paid until after the passing of the company's accounts at the Annual General Meeting. On appeal the Privy Council held:

> (1) the courts in applying section 181 of the Companies Act, 1965, should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions which were based upon a different section and in some cases restrictive. The same would apply, though with less force, to reliance upon Australian decisions based upon section 186 of the Australian Companies Act, 1951;
>
> (2) relief could not be sought under section 181 of the Companies Act, 1965 merely because facts were established which would found a minority shareholders' action; the section required "oppression" or "disregard" to be shown and these were not necessary elements in a minority shareholders' action. But if a case of "oppression" or "disregard" were made out the section would apply and it was no answer to say that the relief might also have been obtained in a minority shareholders' action;

(3) for the case to be brought within section 181(1)(a) of Companies Act 1965 at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon that power, made policy or executive decisions, with which the complainant did not agree, was not enough. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly "disregard" involved something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure;

(4) what was attacked by section 181(1)(a) of the Companies Act was not particular acts but the manner in which the affairs of the company was being conducted or the powers of the directors exercised. These might be held to be "oppressive" or "in disregard" even though a particular objectionable act might have been remedied;

(5) in this case none of the nine particular complaints listed by the Federal Court were substantiated and such relief as the Federal Court decided to give in respect of four of them could not be justified. There was no occasion to grant the ancillary relief under the remaining heads;

(6) the grant of winding up was in the discretion of the court. In exercising this discretion the court would have in mind the character of the remedy, if sought to be applied to a company which was a going concern; it would take into account *inter alia* the gravity of the case made out under section 181(1) of the Companies Act 1965; the possibility of remedying the complaints proved in other ways than by winding the company up; the interest of the applicant in the company; and the interests of other members of the company not involved in the proceedings. In this case the respondent had failed completely to make out a case for winding up the company;

(7) the remuneration of the directors and of the managing director which had been regularly voted and approved by the shareholders was a matter for them and no case could be made for interfering with that decision.

Lord Wilberforce (delivering the judgment of the Court) at pp. 228-229 said:

> Before examining such heads of claim as have survived, their Lordships must refer to the relevant law.
>
> Section 181(1) and (2) of the Malaysian Companies Act, 1965, are as follows:
>
> (SIC)
>
> This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (l)(a) it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section (set *In re H.R. Harmer Ltd.*). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the kinds of relief which may be granted, it provides for "remedying the matter complained of" and states as a specific type of relief that of winding-up of the company.
>
> Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the "just and equitable" provision in the Act. But also that to wind-up the company would unfairly prejudice the "oppressed" minority. The Malaysian section, on the other hand, requires (under subsection 1(a)) a finding of "oppression" or "disregard", and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.
>
> There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part Relief cannot be sought under section 181

merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) "oppression" or "disregard" to be shown, and these are not necessary elements in the action referred to.

But if a case of "oppression" or "disregard" is made out the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders action. To the extent that the appellants so contend their Lordships do not accept their argument.

Secondly, for the case to be brought within section 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more, of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked, As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made *(Elder v. Elder & Watson Ltd.)*: their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale*). Neither "oppression" nor "disregard" need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for section 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg, *In re Jermyn Street Turkish Baths Ltd*); where there has been oppression in the past the section does not bite. Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a)) relates to a present state of affairs: "are being conducted", powers "are being exercised" are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been done or

threatened. But this argument must not be taken too far. What is attacked by sub-section (l)(a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty. Ltd.*

Their Lordships have made these observations upon the Malaysian section 181, not because they disagree with the statement of the law by the Federal Court – which indeed recognized the wider scope of section 181 as compared with the corresponding provisions in England and in Australia, They are concerned rather to emphasise the utility of the jurisdiction conferred upon the courts in Malaysia, and to deal with particular arguments urged in this case with some of which they do not agree. It is now necessary to relate them to the facts as proved.

The principles stated in the above case have been followed not only by the Malaysian courts but also by the Singapore courts and other courts in the Commonwealth. This is the leading authority in respect of s. 181 of the Companies Act 1965.

[9] In *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 73 Anuar J (as he then was) cited *Re Tivoli Freeholds Ltd.*:

In *Re Tivoli Freeholds Ltd* at p 452, Menhennitt J said:

Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition. However, in the kind of situation which arises in this case and having regard to the matters relied upon by the petitioner and the supporting members, the following elements are I think included in the matters postulated in the section and are also established by the authorities:

(1) Those alleging that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct which the Court of Appeal has recently restated in the case of *Re Jermyn Street Turkish Baths Ltd*

> [1971] 1 WLR 1042 at p 1059, as conduct which is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Cooperative Wholesale Society Ltd v. Meyer* [1959] AC 324 at p 342, 'burdensome, harsh and wrongful' to the other members of the company or some of them and lacks that degree or probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v. Meyer* and *Re HR Harmer Ltd* [1959] 1 WLR 62.

It is to be noted that Buckley LJ, delivering the judgment of the court, appears to have stated lack of probity of the kind described as an element additional to the requirement that the conduct must be unfair or burdensome, harsh and wrongful. In *Scottish Cooperative Wholesale Society Ltd v. Meyer*, Lord Keith at p 364, stated the test as 'lack of probity and fair dealing', using the word 'and'. However, in Lord Keith's judgment in *Elder v. Elder and Watson Ltd* [1952] SC 49 at p 60, adopted by Jenkins LJ in the case of *Re Harmer Ltd* at p 78, Lord Keith said: 'oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder'. There it is put in the alternative. In the light of these statements, I deal with this petition on the basis that there may be cases in which either lack of probity or unfairness may be sufficient in itself to make conduct oppressive to a member. In the unreported decision of Lush J in *M Dalley & Co Pty Ltd* (30 April 1968) his Honour stated, at p 43: 'In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative "lack of probity or fair dealing" by Lord Keith indicates. One person may "subject another to continual injustice" by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.' Later in his judgment as part of his finding that there had been oppression in that case his Honour said at p 45, that 'the respondents were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage'.

He later said that the respondents' stand was 'dictated by the self interest of the directors and obdurately maintained' (at p 46). Although the High Court reversed the decision of Lush J on another point ([1968] 43 ALJR 19), the order made by the High Court, at p 24, was an order for the purchase of the shares of minority shareholders, which can be made only under s. 186 of

A the Companies Act 1961 and not on the just and equitable ground alone under s. 222(l)(h). For this reason, it appears to me that the High Court's order in *Dalley*'s case affirms the conclusion that there was oppression in that case. Accordingly, I proceed on the basis that persistent illegal conduct towards a shareholder may be B sufficient to constitute oppression of him if it is dictated by self-interest.

(1) The oppression must be of the members as such, that is in their capacity as shareholders. It was so decided in *Re HR Harmer Ltd* [1959] 1 WLR 62 at 75, in respect of the C English equivalent provision, namely, s. 210, and the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1012, held that this consideration applies to s 186(1) of the Victorian Companies Act: see also per Lord Keith in the passage cited above from *Elder v. Elder and Watson Ltd* [1952] SC 49.

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(3) It appears to follow from the last-mentioned concept and the reference in the section to the affairs of the company being conducted in a manner oppressive to members that there must be something adverse, or detrimental to the members' financial interests as shareholders. In all the reported cases E of which I am aware, where oppression has been found, this has been the fact and it was this aspect to which I understand Jacob J, referred when he said in *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWR 1648 at p 1662, that, the word oppressive involves, among other things, that F 'some member or members have suffered in a pecuniary sense in their capacity of members *(Scottish Co-operative Wholesale Society v. Meyer)* that is to say, their rights as members have been affected'.

(4) The affairs of the company must be being conducted in a G manner oppressive to some member or members when the petition is presented. This is involved in the expression 'are being conducted': see *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059.

H (5) Oppression may occur even although all the members of a company are treated equally: see, for example, *Meyer*'s case. The unfairness may arise, for example, by reason of an advantage to a parent company.

(6) So far as the alleged oppressors are concerned, it must also I be established it seems to me that oppression results from 'some overbearing act or attitude on the part of the oppressor': *Re Jermyn Street Turkish Baths Ltd* at pp 1042 and

1060. In delivering the judgment of the Court of Appeal, Buckley LJ, having defined aspects of oppression applicable to that case, then said at p 1060: We do not say that this is so far as the alleged oppressors are concerned, it must also be necessarily a comprehensive definition of the meaning of the word 'oppressive' in s. 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor'.

Having stated that what had earlier been said was not necessarily a comprehensive definition, his Lordship appears to me to have then stated what is a universal element in the sentence beginning 'Oppression must, we think, import'. Again, whilst not stating it as a universal test, the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011, applied the test that 'conduct would be oppressive within the meaning of s. 186 if directors or shareholders holding a controlling power in the direction of the company's affairs were to pursue a course of conduct designed by them to advance their own interests or the interests of others of their choice to the detriment of the company or the detriment of other shareholders'. The concept of 'some overbearing act or attitude' appears to me to be involved in Viscount Simond's expression 'burdensome, harsh and wrongful'. To determine whether conduct is unfair it is necessary to examine it from the point of view of both the alleged oppressed and the alleged oppressor. In *Re M Dalley & Co Pty Ltd, supra,* in making his findings of oppression, Luah J relied upon his findings that the respondents had sought to remove the petitioner from the company at relatively small cost and had been dictated by self-interest.

(7) It is a corollary of the element referred to in (6) above that 'it was not intended by s. 186 or s. 94 to give jurisdiction to the court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors who in the exercise of the powers conferred upon them by the memorandum and articles of association are acting honestly and without any purpose of advancing the interest of themselves or others of their choice at the expense of the company or contrary to the interest of other shareholders' (per the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011).

A Buckley J, as he then was, referred to the same aspect in *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at p 751; [1966] 1 All ER 232 at PP 246, 247, when he said: 'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. (emphasis added).

[10] The words 'unfairly prejudicial' and 'just and equitable' had been explained by Hoffmann LJ in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at pp. 17-19 where he said:

3. 'UNFAIRLY PREJUDICIAL' AND 'JUST AND EQUITABLE'

What must a petitioner show in order to justify an order under s. 459 or an order to wind up? The grounds for winding up are that it is 'just and equitable' to do so. The grounds for an order under s. 459 are that

> 'the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least [the petitioner]).

…

'Unfairly prejudicial' is deliberately imprecise language which was chosen by Parliament because its earlier attempt in s. 210 of the Companies Act 1948 to provide a similar remedy had been too restrictively construed. The earlier section had used the word 'oppressive', which the House of Lords in *Scottish Co-op Wholesale Society Ltd v. Meyer* [1958] 3 All ER 66 [1959] AC 324, [1959] 3 WLR 404 said meant 'burdensome, harsh and wrongful'. This gave rise to some uncertainty as to whether 'wrongful' required actual illegality or invasion of legal rights. The *Jenkins Committee on Company Law*, which reported in 1962, thought that it should not. To make this clear, it recommended the use of the term 'unfairly prejudicial', which Parliament somewhat tardily adopted in s. 75 of the Companies Act 1980. This section is reproduced (with minor amendment) in the present s. 459 of the Companies Act 1985.

…

In deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association.

The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. As a matter of ordinary company law, this may or may not entitle the individual shareholder to a remedy. It depends upon whether he can bring himself within one of the exceptions to the rule in *Foss v. Harbottle* [1843] 2 Hare 461. But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459. Enabling the court in an appropriate case to outflank the rule in *Foss v. Harbottle* was one of the purposes of the section. So in *Re a Company (No 00370 of 1987), ex p Glossop* [1988] BCLC 570, [1988] I WLR 1068, where the complaint was of a consistent refusal by the board to recommend payment of a dividend, Harman J said that such conduct could make it just and equitable to wind up the company. He did so by reference to the seminal judgment of Lord Wilberforce in *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] I All ER 1126, [1974] AC 821 on the principles by which the court decides whether the conduct in question could justify a just and equitable winding up and also whether it is unfair for the purposes of s. 459. ...

Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. There is often sound sense in the rule in *Foss v. Harbottle* [1843] 2 Hare 461. In choosing the term 'unfairly prejudicial', the *Jenkins Committee* (para 204) equated it with Lord Cooper's understanding of 'oppression' in *Elder v. Elder and Watson* [1952] SC 49:

A

> a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

B So trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459.

Not only may conduct be technically unlawful without being unfair: it can also be unfair without being unlawful. In a commercial context, this may at first seem surprising. How can it be unfair C to act in accordance with what the parties have agreed. As a general rule, it is not. But there are cases in which the letter of the articles does not fully reflect the understandings upon which the shareholders are associated. Lord Wilberforce drew attention to such cases in a celebrated passage of his judgment in *Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All ER 492 at 500, [1973] D AC 360 at 379, which discusses what seems to me the identical concept of injustice or unfairness which can form the basis of a just and equitable winding up:

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere judicial entity, E with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the F Companies Act 1948 and by the articles of association by which the shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the G obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and H another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way.

Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power I conferred by the articles upon the board or the company in

general meeting. I have in the past ventured to borrow from public law the term 'legitimate expectation' to describe the correlative 'right' in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend. These relationships need not always take the form of implied agreements with the shareholder concerned; they could enure for the benefit of a third party such as a joint venturer's widow. But in *Ebrahimi v. Westbourne Galleries Ltd* ([1972] 2 All ER 492 at 500) Lord Wilberforce went on to say:

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that the company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more. …

Thus in the absence of 'something more', there is no basis for a legitimate expectation that the board and the company in general meeting will not exercise whatever powers they are given by the articles of association.

[11] In *Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd* [1995] 1 LNS 317 Mohd Ghazali J (as he then was) said:

> From my reading of the circumstances forwarded by the petitioner, the oppression that he was complaining about seems to relate more towards the directors of the respondent company rather than towards the affairs of the respondent company itself. From the facts, I gather that the petitioner and a few directors and shareholders of the respondent company are from the same family. The petitioner has contended that the respondent company in essence is managed by three directors, namely, TBC, the said Toh Kian Boon and one Toh Keng Gee. He claimed that he played a significant role in the respondent company for over 30 years and that he had continued to serve the company until his employment was terminated on 15 June 1994. In his affidavit in

support of the petition, he did not specifically state that he was its chief executive and had chaired several meetings relating to the transaction over the said land but only said so when TBC alleged in his affidavit that he had failed to disclose 'fully and frankly' all the facts. In reply, the petitioner explained that being the elder brother of the family, he was invited to chair most of the meetings but contended that 'he believed that he was only informed of the facts that they wish to let him know'.

As stated earlier, what needs to be determined by the court is whether the petitioner has brought himself within the scope of s. 181(1) of the Act. What is the scope of s. 181(1)? In *The Law of Company Liquidation* by J O'Donovan (3rd Ed), which was referred to in the submission of counsel for the respondent company, the learned author said (at pp 141-142) that relief under s. 320 of the Australian Companies Act (which is the equivalent of s. 181 of our Act) is available to any member of a company who complains that its affairs are being conducted in a manner which is oppressive to one or more of the members, including himself and that the second requirement is that it must be the affairs of the company itself which are conducted in an oppressive manner. The learned author then went on to say at pp 143-144):

> It has frequently been stressed that s. 320 is not intended to provide minority shareholders with a means of stultifying the voting power of the majority: ...
>
> The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members *qua* shareholders, and not merely a subordination of their wishes to the power of the voting majority (*Re Harmer Ltd* [1959] 1 WLR 62 at p 87 per Romer LJ).
>
> Hence, it does not constitute oppression for those in control to insist upon the adoption of a policy on a matter of business on which there may be legitimate differences of opinion, nor is it oppression if an existing state of inequality results from the provisions of the constitution of the company and not from any action on the part of those in control.

> The word 'oppressive' was defined in *Re Harmer Ltd* (referred to above) to mean 'burdensome, harsh and wrongful'.

In *Elder & Ors v. Elder & Watson Ltd* [1952] SLT 112, with regard to the phrase oppressive to some part of the members' found in s. 210 of the English Companies Act 1948 (which is the equivalent of s. 181 of our Act), Lord President (Cooper) said (at p 113):

> ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. This, broadly speaking, was the class of case which the draftsman of s. 210 evidently had in mind, and the question is whether the petitioners have brought themselves, within the scope of the section.

At p 116 of the same case, Lord Keith said:

> It is not lack of confidence between shareholders *per se* that brings s. 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder;

And at the same page further said:

> The company's affairs must be conducted in a manner oppressive to some part of the members and that connotes to my mind an abuse of power by some person or persons controlling the company and resulting in injury to the rights of some part of its members.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, Lord Wilberforce said (at p 229):

> The Malaysian section, on the other hand, requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up.

Further down at p. 759 the learned judge said:

> For the petitioner to succeed in his application for the said reliefs, he must show the following, namely:
>
> (i) that it is the affairs of the respondent company itself which are conducted in an oppressive manner; and
>
> (ii) that the respondent company has oppressed the minority shareholders including himself.
>
> On the whole, I am of the view that the circumstances and matters complained of by the petitioner do not at all denote that there was oppression within the meaning of s. 181(1) of the Act. There is nothing to show that the respondent company's actions complained of were designed to injure the petitioner in his rights as a member. The petitioner was privy to the whole transaction from day one, ie from the day the three lots were sold to Wangsa Idaman Sdn Bhd and the negotiations and agreements which ensued after TBC informed the respondent company that Mustapha Buang was in a position to get the said land 'converted' and subdivided for the purpose of developing it into an industrial estate right up to his termination as chief executive of the respondent company. He is a member of both the respondent company and LMSB and there is evidence to show that he was aware of the arrangement made between the respondent company and Mustapha Buang who was using Wangsa Idaman Sdn Bhd as a vehicle for the 'conversion' and subdivision of the said land. His contention that the approval was only with regard to surrender and re-alienation and not by way of 'conversion' and subdivision has no bearing upon his complaint at all as the end result was the same, ie the state government has agreed to the surrender and re-alienation of the said land in the form of several units with the category of land use of 'building' and 'industry'.

[12] Let us now turn to the present appeal. The learned judge in his judgment said:

> The matters relied on by the Petitioner as justifying those allegations concern (leaving out those which the Petitioner no longer pursue):
>
> (1) the loan of RM3.78 million and the interest charged;
>
> (2) charging to the Petitioner the salaries of three staffs of the 2nd Respondent; and

(3) Using the Petitioner's staff to look after the affairs of the 2nd Respondent's store in Lawas, Sarawak

(1) RM3.78 million loan and interest charged

The books of the Company showed that the 2nd Respondent had advanced to the Company the sum of RM3.78 million as on 31 May 2003 but this was queried by the Petitioner and also queried was the rate of interest charged. This resulted in the appointment of Ernst & Young, a firm of auditors, to verify the matter and the firm came back with their report on 17 September 2004 after the petition was filed. The report was of the view that of the alleged RM3.78 million loan, the sum of RM861,366.35 was not supported by any verifiable documents. But it was recorded in the minutes of the Company's board meeting held on 10 November 2005 that Liew Tuck Wah, the area manager of the Company, "had furnished all the documentation to Ernst & Young to provide him with a written confirmation that the amount of RM861,000/- had been reconciled in the year 2004". When Liew Tuck Wah testified, he was not questioned as to his said assertion in the board meeting that the sum had been reconciled and as to how it was reconciled. What is established at most was that there was some accounting deficiency, in that credits and debits were raised without the usual consent or the necessary supporting documents, and not that there was any attempt on the part of any of the Respondents or any of them to inflate the amount of the indebtedness so as to siphon the money of the Company away. It was not suggested to any of the witnesses who testified on behalf of the Respondents and neither did the auditor's report so suggest. However, whether the sum of RM861,000 had been reconciled as asserted by Liew Tuck Wah depends very much on the auditor's confirmation for which Liew Tuck Wah was supposed to obtain for tabling at the next board meeting. There is no evidence as to whether the auditor will or will not confirm the reconciliation. Given the manner in which the accounts were kept and kept by the same internal accountant working for the Company, the 2nd Respondent and another company called Maestro Products Sdn Bhd, the Petitioner was justified in being suspicious and for feeling that something was amiss which the auditor confirmed. I am not unaware that the Company was already given the opportunity to explain and had in fact attempted to explain by supplying the documents through their letter dated 22 April 2004 as noted by the auditor but fail to do so. If Liew Tuck Wah's assertion that the account had been reconciled is true and confirmed by the auditor, that would be the end of the

matter. If it cannot be reconciled and an auditor so say, it would mean that what was asserted by Liew Tuck Wah at the meeting was a ruse to get out of the situation and made for the purpose of defeating the petition; if it is such a ruse, it could only work for now but cannot defeat a subsequent petition based on the failure to reconcile the account because the failure worked to the advantage of the 2nd and 3rd Respondent, it being that Maestro Products Sdn Bhd is a company under their control. For the present, the manner, described earlier, in which the accounts had been maintained disadvantage of the Company and thus to the detriment or disregard of the interests of the Petitioner and that also explained their lack of urgency in resolving the matter of the said deficit amount. It was not unreasonable for the Petitioner on the matters I have referred to lose their trust and confidence in the 2nd Respondent as a partner of the joint venture enterprise.

It was contended on behalf of the Respondents that "PW1 agreed during cross examination that the issue of advances and interest charged on the advances by the 2nd Respondent had been resolved (page 14 NOP)." But that is not quite correct because it was only the question of interest that was resolved as can be gathered by the following question and answer of PW1, Datuk Lo Vui Bin and not the question of the amount of the loan:

> Put Interest charged – issue resolved by 1st respondent agreeing to pay interest at the rate of 2.5% above BLR
>
> A Yes, subsequent to petition

As for the matter of the interest, even if it had been resolved it does not mean the end of the petition because, as said in *Re Kong Thai Sawmill (Miri) Sdn Bhd*, at p. 229:

> What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for remedy under the section.

It bears mentioning that before the matter of the interest was resolved the 3rd Respondent had attempted to explain that certain interest was not really interest but "3% charged by Maestro Products Sdn Bhd as commission is actually for freight charged incurred on centralizing purchasing". At the very least, that attempted explanation was a clear admission that the accounts kept do not reflect the actual nature of the transaction and surely it is not a behavior that one expects from a joint venture partner.

(2) Company paying salaries of three staffs of 2nd Respondent

It is not in dispute that the Company was made to pay for the salaries of three staffs who were based in the office of the 2nd Respondent in Kuala Lumpur totaling over RM30,000.00 per month. The 3rd Respondent justified it in these words:

Q 2002 board meeting, you reported that 3 staff prorata - P2(265)

A I notice that there were a lot of duplication in the job function of all the store. For administrative efficiency purpose, consolidated some of these functions for all the stores as a means of cost cutting and administrative harmony among the stores, for eg. Robert Tan, advertising and promotion manager for 1st Respondent salary was allotted to rest of store in Sarawak and there are also similar cases whereby some personnel in the Sarawak store also provide services to rest of the store and they were a lot of cross invoices going over the place billing each other and quarrelling also whether they should be paid. I consolidated about 8 functions of these stores to a group, prorated to avoid the disharmony, duplication of work and to allow the stores to focus on sales and performance. Those functions are central merchandising for whole group, operational efficiency in terms of quality and procedure, centralizing company secretarial work and legal, centralizing advertising and promotional activity, centralizing HR procedure and policy, centralizing management information system, internal audit and accounts department policy and procedure. Total salaries for all these people is approx. 2.2m per annum and allocation of cost of these people is given to all the stores and it will clear away all the disharmony on the billings and also reduce costs. This is what I meant by pro rata.

A Q How many stores are involved

A 12 at that point in time, 1st respondent in KK, 11 in Sarawak

Q 3 staff charged exclusively to 1st respondent account

B

A For this team of people they are just centralizing team, 15 buyers, providing service. Yes

Q Why do you do that

C A It was allocation of costs, balance went to the other stores that is the other 11 stores

Q 3 staff - still under payroll of 1st respondent

A No

D

Q Why not

A When they resigned, new people were recruited to replace their position and because jv partner not happy with this arrangement salaries were no longer charged to 1st respondent. 3 staff resigned probably 2002 or whatever.

E

If anything, it shows that unless the Petitioner is constantly on the alert about how the 2nd Respondent dealt with the accounts including how it charged the Company with expenses, the expenses may simply be loaded to the disadvantage of the

F Company and thus affects the bottom line of the account of the Company. The fact that the 2nd Respondent had stopped doing so, that is charging the Company the salaries of the staffs employed by the 2nd Respondent, is a clear admission that it was wrong to do so in the first place. The so-called pro rata sharing of the expenses, as explained by the 3rd Respondent, do not hold

G water simply because what the 2nd Respondent alleged they were doing to justify loading the salaries onto the Company was already provided for in the form of payment of a fee of 1% based on the turnover of the Company by the Petitioner to the Respondent which worked out to be RM300,000 in one year and RM450,000

H in another year. Since the explanation was obviously untenable, it would have been a waste of time to examine the 3rd Respondent on this point when she testified and therefore that fact that she was not questioned on this does not mean that what was done was right when it was admittedly wrong in the 2nd Respondent discontinuing such loading of salary expenses onto the Company.

I

(3) Using Company's staff to look after Lawas store of 2nd Respondent

Again there is no dispute that a staff paid for by the Company was made use of to look after the Lawas store of the 2nd Respondent in which the Company has no interest. But 3rd Respondent was dismissive of the issue by saying that: "Too small an amount to make it an issue." It was also revealed that the staff was also made use of to help in the Marudu store of the 2nd Respondent.

Conclusions

When you have such a series of incidents as have been adverted to earlier with each resulting in the detriment of the Petitioner but to the advantage of the 2nd Respondent, then the cumulative effect of them is to make any partner of the 2nd Respondent very wary of their behavior and justifiably to lose confidence in them. This is exactly what has happened with the Petitioner. The situation is made worse by the attitude of the 3rd Respondent, who ran not only the Company but eleven other stores belonging to the 2nd Respondent, in saying, what I would term, what comes to mind without caring for the consequence or the accuracy and if it was to her advantage; this is a reflection in the unfair manner she dealt with the Company and the Petitioner. When the 3rd Respondent was queried in a meeting on why the Company was suffering losses as compared to other profitable years, this was minuted as to what she had said:

> The Board noted Ms Kat Yong's statement that the Company has been losing money since day one and that the old management together with the auditors is represented the accounts of the Company to reflect profit making position in the initial years.

That accusation had since been retracted and it was sought to explain that what the 3rd Respondent said was a "knee-jerk reaction" but it reflects adversely on the person making the statement. Not only did she say what came to mind, she seems also to say whatever meets her aim which was to justify the losses irrespective whether it is the truth and how as a result it unfairly casts aspersion on others by saying the accounts were fabricated. That being the case, it is difficult to expect the Petitioner to continue to have confidence and trust in the 3rd person and consequently in the 2nd Respondent, since the 3rd Respondent is in effective charge of both the Company and the 2nd Respondent. Then there is the manner in which the account

was loaded with expenses against the Company's interest and consequently against the interest of the Petitioner which I have already adverted and which contributed to the losses of the Company. What I have said clearly established the fact that the 2nd Respondent and the 3rd Respondent had conducted the affairs of the Company in a manner oppressive to the Petitioner and in disregard to its interest.

It was contended that the Petitioner made baseless allegation of oppression and disregard in order to wrest control of the Company but this contention cannot be sustained since the allegations, given what I have already said, are obviously not baseless. It was also argued that the conduct of the 2nd Respondent or the 3rd Respondent cannot be oppressive or in disregard of the interest of the Petitioner when they went about fine-tuning the purchase system which resulted in lower cost to the Petitioner and when they lent money to the Company when fund was needed. Again those exercises were used to unjustifiably charge the Company with salaries which the 2nd Respondent should have paid and to charge the Company with interest on yet to be accounted for loan for a substantial sum which I had mentioned earlier; they were tools to oppress the Petitioner and to disregard the interest of the Petitioner. What is left to consider is the orders I should make.

[13] Before proceeding further, it is better for us to remind ourselves that the 1st respondent was a Joint Venture Company (JV) where there is a big disparity in the shareholding, namely, the petitioner is holding only 30% of the shares while the 2nd respondent is holding 70% of the shares. The petitioner contributed RM900,000 to the paid-up capital of the 1st respondent while the 2nd respondent contributed RM2,100,000. The petitioner acknowledged that before the incorporation of the JV the 2nd respondent had 11 supermarkets all over Sarawak which indirectly recognized the expertise of the 2nd respondent in the business of supermarkets. The JV was established to carry out the business of supermarkets in Kota Kinabalu. We are not sure why there is a big disparity in the shareholding of the JV between the petitioner and 2nd respondent because in normal joint venture the shareholding of the company would be in equal shares with very minor disparity.

[14] Whatever is the disparity in the shareholding of the JV, it is clearly stated the Board of Directors consisted of three members from the petitioner of which one of them would be the chairman while the 2nd respondent would have five members of which one of them would be the managing director. This is not in accordance with the shareholding of the parties and we believe this is the concession given by the 2nd respondent to the petitioner. Under the JV Agreement the business of the 1st respondent is to be carried out at a building owned by a subsidiary of the petitioner with a fixed rent. In our view, this is another concession given by the 2nd respondent to the petitioner. The 1st respondent was incorporated on 24 June 1998. It is not disputed that the 2nd respondent is a public listed company on the 2nd Board of the KLSE.

[15] Since the 2nd respondent is a public listed company the minority shareholding of the company keeps changing as and when its shares are traded. The petitioner knew of this fact before entering into the JV Agreement. We are enlightening this fact because the 2nd and 3rd respondents alleged that the petitioner raised the issue of oppression and disregard of the interests of the minority shareholders in order to wrest control of the 1st respondent. The learned judge had brushed aside this allegation as baseless. We are of the view that the allegations are not baseless. As can be seen from the record itself on 17 April 2001, hardly three years after the JV was incorporated, the petitioner through its solicitors wrote to the 2nd respondent the following letter:

> The Managing Director
> Ngiu Kee Corporation (M) Bhd
> (Company No. 381317-H)
> Lot LG03.G04B2 & 1.03
> Wisma Saberkas
> Jalan Tun Abang Haji Openg
> 93000 KUCHING
>
> Dear Sir/Madam
>
> Re Joint Venture Agreement Dated 10/07/98
> Between Pan-Pacific Construction Holdings Sdn Bhd
> And Ngiu Kee Corporation (M) Bhd
> Notice of Termination

A We act for Pan-Pacific Construction Holdings Sdn Bhd in the matter at hand.

We refer to the recent resignations of all of the former directors of your company namely, Mr. Tan Ah Ngew, Mr. Philip Tang Huat Hung and Mr. John Tang Kiong, and are instructed by our B client to refer you to section 8.2:3 of the Joint Venture Agreement dated 10 July 1998, which provides that a Termination Event is deemed to have occurred if there is any change in the control or ownership of a party without the prior written consent of the other party.

C In this respect, our client has also received a copy of the "letter from the HSBC Bank Malaysia Berhad dated 12 April 2001, suspending the banking facilities accorded to Pacific-Ngiu Kee Sdn with effect from 21 April 2001 until further notice, owing to "the recent change in management in both Pacific-Ngiu Kee Sdn Bhd D and Corporate guarantor Ngiu Kee Corporation Bhd".

We are instructed by Pan-Pacific Construction Holdings Sdn Bhd to give you NOTICE that they wish to exercise their rights under section 8.3:1 of the said Joint Venture Agreement and you are hereby required to sell all of your shares in the Pacific-Ngiu Kee E Sdn Bhd to our client subject to the terms provided in the said section 8.3:1.

The response to this letter is a letter from the Chief Executive Officer of the 2nd respondent dated 19 April 2001:

F Pan-Pacific Construction Holdings Sdn Bhd
Lot 1-8-E8A & E8B,
8th Floor, Centre Point Sabah,
No. 1 Jalan Centre Point
88000 Kota Kinabalu, Sabah.

G Attn: Mr. Andrew Lo
Re Joint Venture Agreement Dated 10/07/98
Between Pan-Pacific Construction Holdings Sdn Bhd
And Ngiu Kee Corporation (M) Berhad

H We refer to your lawyer's letter Ref No. CPS/0014/SUNYAP/HC and our meeting between our Ms. Kat Yong and Mr. Andrew Lo today.

As indicated by your Mr. Andrew Lo, we understand that your headquarters in Taiwan has agreed to sell the 30% shares to us. I Therefore, we would like to formally make an offer to acquire the 30% shares on the basis as per our Joint Venture Agreement.

We would also like to propose that the above matter to be referred to our Auditors, Ernst & Young to determine the valuation of the Fair and Commercial Price subject to fee and expenses approved by us.

Thank you.

The response to this letter was a letter from the petitioner's solicitors dated 11 May 2001 which reads:

Chief Executive Officer
Ngiu Kee Corporation (M) Bhd
(Company No. 381317-H)
Lot LG03, G04B2 & 1.03
Wisma Saberkas
Jalan Tun Abang Haji Openg
93000 KUCHING

Dear Madam

Re Joint Venture Agreement Dated 10/07/98
Between Pan-Pacific Construction Holdings Sdn Bhd
And Ngiu Kee Corporation (M) Bhd

We are instructed by Pan-Pacific Construction Holdings Sdn Bhd to reply to your letter dated 19 April 2001 offering to acquire our client's entire shareholdings ("Shares") in Pacific-Ngiu Kee Sdn Bhd.

Without prejudice to our Notice of Termination dated 17 April 2001, we are pleased to inform you that our client is willing to transfer the Shares to your company subject to the following terms.

1.1 Upon the signing of a sale of shares agreement, Ngiu Kee Corporation (M) Bhd shall:

1.1.1 pay one half of the Deposit (as stipulated by section 3.2 of the Sublease Agreement dated 14/09/00) in cash and deliver an unconditional bank guarantee in favour of our client for the remaining half of the Deposit - the total "Deposit" sum is RM675,463.08 calculated at RM6.00 x 112.577.18 sq. ft;

1.1.2 appoint Ernst & Young to determine the Fair and Commercial Price for the sale of the Shares; and

1.1.3 procure the return of the Corporate Guarantee executed by our client in favour of the HSBC Bank Malaysia Berhad.

A 1.2 The Fair and Commercial Price as determined by Ernst & Young shall be final and binding and Ngiu Kee Corporation shall complete the acquisition of the Shares within 90 days of the Fair and Commercial Price being determined.

B 1.3 Except as provided herein, the sale of the Shares shall be subject to the standard terms and conditions of a sale of shares agreement to be drawn-up by the solicitors for Pacific Construction Holdings Sdn Bhd.

C 1.4 Ngiu Kee Corporation (M) Bhd shall be responsible for the legal and professional fees incurred in drawing-up the sale of shares agreement and in determining the Fair and Commercial Price for the sale of the Shares.

1.5 Ngiu Kee Corporation (M) Bhd shall be responsible for
D stamp duty, registration fee and any other charges payable on account of the transfer of the Shares.

We look forward to your early reply on the above terms.

[16] As can be seen from the above letter, though the petitioner
E agreed to sell their 30% shareholding, it imposed many conditions which is available under the JV Agreement to make it difficult for the 2nd respondent to agree. Surprisingly, before the 2nd respondent could respond to the above letter the solicitors for the petitioner dispatched another letter dated 17 May 2001 which
F reads:

Chief Executive Officer
Ngiu Kee Corporation (M) Bhd
(Company No. 381317-H)
Lot LG03, G04B2 & 1.03
G Wisma Seberkas
Jalan Tun Abang Haji Openg
93000 KUCHING

Dear Madam

H Re Joint Venture Agreement Dated 10/07/98
Between Pan-Pacific Construction Holdings Sdn Bhd
And Ngiu Kee Corporation (M) Bhd

We refer you to our letter of 11 May 2001 (ref CPS/001/
I SUNYAP/HC/2).

Pan-Pacific Construction Holdings Sdn Bhd now instructs us to inform you that they intend to acquire your 70% store holdings in Pacific-Ngiu Kee Sdn Bhd as per the terms of our Notice of Termination of 17 April 2001.

TAKE NOTICE therefore that the terms of our client's offer to transfer their entire shareholdings in Pacfic-Ngiu Kee Sdn Bhd to you as set out in our without prejudice letter of 11 May 2001, is hereby withdrawn with immediate effect.

The response to the last two letters was a letter dated 23 May 2001 from the solicitors for the 2nd respondent which reads:

Messrs, Cheu, Adnan & Razi
Suite 1-6-E7 & E8, 6th Floor
CPS Tower, Centre Point Sabah
No.1 Jalan Centre Point
88000 Kota Kinabalu, Sabah.

Dear Sirs,

RE: JOINT VENTURE AGREEMENT DATED 10/7/98 BETWEEN PAN-PACIFIC CONSTRUCTION HOLDINGS SDN BHD & NGIU KEE CORPORATION (M) BHD

NOTICE OF TERMINATION

We refer to the above matter wherein we act for Ngiu Kee Corporation (M) Bhd.

We have been instructed by our client to inform you as follows:

1. That our client denies that they are in breach of the Joint Venture Agreement ("the said JV Agreement") as alleged by your client *via* your letter dated 17 April 2001.

2. That pursuant to a meeting between your client and our client on the 19th April 2001, one Mr. Andrew Lo had indicated that your client's headquarters in Taiwan agreed to sell their 30% shares in the joint venture company to our client in accordance with the terms of the said JV Agreement.

3. That on the same day, our client orally accepted the offer to purchase your client's 30% shares in the joint venture company, which was confirmed by our client's letter to your client *via* a letter dated 19th April 2001.

A

4. That in furtherance to paragraph 3 above, our client orally instructed the company auditors, Messrs Ernst & Young on the same day to ascertain the valuation of the Fair and Commercial Price of the shares.

B

5. That your client has further consumed the sale of their 30% shares in the joint venture company *via* your letter dated 11th May 2001.

6. That in view of the contract concluded between the parties, your letter dated 17th May 2001 purporting to withdraw your client's offer is not valid.

C

Under the circumstances, we have been instructed by our client to inform you that our client shall proceed with the purchase of the 30% shares as agreed between the parties. Take note, that our client shall hold your client responsible for any failure on their part to sell their 30% shares in the joint venture company to our client.

D

The response to this letter was a letter from the petitioner's solicitors dated 29 May 2001:

E

Paul Cheah & Associates
Advocates & Solicitors
Unit A-11-8, 11th Floor
Megan Phileo Promenade
No. l89 JalanTun Razak
50400 Kuala Lumpur

F

Dear Sirs

Re Joint Venture Agreement Dated 10/07/98
Between Pan-Pacific Construction Holdings Sdn Bhd & Ngiu Kee Corporation (M) Bhd

G

Notice of Termination

We are instructed by Pan-Pacific Construction Holdings Sdn Bhd to refer to your faxed letter of 23 May 2001.

H

Our client confirms that they will insist on their rights to purchase Ngiu Kee Corporation (M) Bhd's 70% shares in Pacific-Ngiu Kee Sdn Bhd as per terms of our Notice of Termination of 17 April 2001.

I

We do not agree that the events set out in your said letter gave rise to concluded contract between the parties for the sale of our client's 30% shares in Pacific-Ngiu Kee Sdn Bhd. These events:

(1) Mr. Andrew Lo "had indicated" that our client has agreed to sell their 30%;

(2) Your client "orally" accepted the offer to purchase our client's 30% shares and confirmed in writing;

(3) Your client "orally" instructed Messrs Ernst & Young to ascertain the valuation of the Fair and Commercial Price of the shares; and

(4) Our client "confirmed the sale of their 30% shares in the joint venture company *via* [our] letter of 11 May 2001;

were nothing more than a series of offers and counteroffers to sell the shares subject to contract and the offered terms set out in our letter of 11 May 2001 were made expressly without prejudice to the rights of our client under the Notice of Termination of 17 April 2001. These offered terms were withdrawn *vide* our letter of 17 May 2001 before your client accepted them.

Unless the parties can reach agreement as to the Fair and Commercial Price for the sale of your client's 70% shares in Pacific-Ngiu Kee Sdn Bhd within thirty days from the date of this letter, our client is agreeable to the appointment of Messrs Ernst & Young to determine the Fair and Commercial Price in accordance with the provisions of clause 7.4 of the Joint Venture Agreement, which provides *inter alia*:

> If the Offerer and the Offeree fail to reach agreement as to the Fair and Commercial Price within the thirty-day period referred to in Clause 7.3 then the matter may be referred by either party to a firm of auditors mutually agreed upon ("the Auditors") who shall determine the Fair and Commercial Price as experts and not as arbitrators and shall serve their determination on the Offeror and Offeree. If the Fair and Commercial Price so certified is unacceptable to the Offeror, the Offeror may elect to treat the offer to sell as terminated. If the Fair and Commercial Price so certified is accepted by the Offeror the offer shall remain open for acceptance by the Offeree for fourteen (14) days from the date of the Auditors' certificate or the expiry of the thirty (30) days aforesaid, whichever is the later.

The "Offeror" in this case is Ngiu Kee Corporation (M) Bhd as provided by the provisions of clause 8.3:1 of the Joint Venture Agreement.

Kindly let us have your client's response in due course.

The respondent's solicitors' response to the above letter is a letter dated 1 June 2001:

> Messrs. Cheu, Adnan.& Razi
> Suite 1-6-E7 & E8, 6th Floor
> CPS Tower, Centre Point Sabah
> No. 1 Jalan Centre Point
> 88000 Kota Kinabalu
> Sabah.
>
> Dear Sirs,
>
> RE JOINT VENTURE AGREEMENT DATED 10/7/98
> BETWEEN PAN-PACIFIC CONSTRUCTION
> HOLDINGS SDN BHD & NGIU KEE CORPORATION
> (M) BHD
> NOTICE OF TERMINATION
>
> We refer to the above matter and your letter dated 29 May 2001.
>
> We have been instructed by our client that the facts remain the same as stated in our letter dated 23rd May 2001. In addition our client reiterates:
>
> 1. That the contract for the sale of the 30% shares by Pan-Pacific Construction Holdings Sdn Bhd to our client was concluded on the 19th April 2001 i.e the day of the meeting between your Mr. Andrew Lo and our client when our client orally accepted your client's offer to purchase the said shares.
>
> 2. That your client's letter dated 11th May 2001 was merely to confirm in writing the concluded sale and its terms and conditions.
>
> 3. That our client has already instructed Messrs Ernst and Young to determine the Fair and Commercial Price of the shares and shall proceed with the purchase of the said shares from your client in due course; and
>
> 4. That the "Offeror" in this case is not Ngiu Kee Corporation (M) Bhd but Pan-Pacific Construction Holdings Sdn Bhd.

[17] On 12 June 2001 the solicitors for the petitioner dispatched the following letter indicating that they would be filing an action in the High Court at Kota Kinabalu to seek a declaration:

Paul Cheah & Associates
Advocates & Solicitors
Unit A-11-8, 11th Floor
Megan Phileo Promenade
No. 189 Jalan Tun Razak
50400 Kuala Lumpur

Dear Sirs

Re Joint Venture Agreement Dated 10/07/98
Between Pan-Pacific Construction Holdings Sdn Bhd &
Ngiu Kee Corporation (M) Bhd
Notice of Termination

We are instructed by Pan-Pacific Construction Holdings Sdn Bhd to refer to your letter of 1 June 2001.

Our client has instructed us to seek a declaration from the High Court at Kota Kinabalu on the issue whether there was a legal and binding offer and acceptance of the sale of their 70% shares in Pacific-Ngiu Kee Sdn Bhd as contended by your client.

[18] Pursuant to that letter the petitioner filed an originating summons dated 27 June 2001 against the 2nd respondent seeking a declaration that the petitioner has the right to purchase the 70% shares of the 2nd respondent in Pacific Ngiu Kee Sdn Bhd. The above originating summons was eventually withdrawn with the consent of both parties.

[19] From the above sequence of events it could be seen that the intention of the petitioner was to take over the 1st respondent. Even after agreeing to sell its 30% holding and imposing several conditions which the 2nd respondent was willing to accept, the petitioner reneged on the offer. Instead it insisted on buying the 70% holding of the 2nd respondent. When the 2nd respondent refused, the petitioner filed the OS seeking a declaration that the 2nd respondent had breached the JV Agreement and as such should sell its 70% holding to the petitioner. The breach cited by the petitioner was the change of shareholding in the 2nd respondent. As we have stated earlier, the 2nd respondent being a public listed company, the shareholding in the 2nd respondent is bound to change. For that reason, we are of the view that the reasons given by the petitioner were rather flimsy. The whole idea of the petitioner was to take over the 1st respondent from the 2nd respondent and run the supermarket by

itself. We believe the second reason given by the petitioner was the appointment of the 3rd respondent. We noted that from the minutes of the management committee meeting that the Chairman of the Board of Directors was the Deputy Managing Director of the 1st respondent before the appointment of the 3rd respondent as the Managing Director in accordance with the JV Agreement. It would not be wrong for us to say that the Chairman (Dato' Lo) was not happy with the appointment of the 3rd respondent as the Managing Director. The evidence shows that before the appointment of the 3rd respondent, the Chairman was the Deputy Managing Director of the 1st respondent and was running the supermarket. With the appointment of the 3rd respondent, his appointment as Chief Executive expired.

[20] Taking the above as a whole we are of the view that the learned judge was in error when he came to the conclusion that the contention of the respondent that the petitioner wanted to wrest control of the company cannot be sustained.

[21] Let us now turn to the issue of 'disregard of interests' and 'oppression' as found by the learned judge. As pointed out in the authorities we have cited there are four broad classes of conduct that would justify judicial remedy under s. 181 of the Companies Act, namely: (a) oppressive conduct; (b) conduct in disregard of interests; (c) unfairly discriminatory conduct; or (d) prejudicial conduct. The learned judge found the act of oppression or disregard of interests of the petitioner by the respondents is in respect of:

(1) The loan of RM3.78 million and interest charged;

(2) Charging to the petitioner the salaries of three members of the staff of the 2nd respondent; and

(3) Using the petitioner's staff to look after the affairs of the 2nd respondent.

[22] We take note that the question whether there is oppression, disregard, unfair discrimination, or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case.

[23] In addition to the three issues raised by the learned judge in his judgment, we would like to add another issue which we feel ought to be considered:

(4) Whether the learned judge was right in making the order that the majority shareholder (the 2nd respondent) has to sell its shares to the minority shareholder (the petitioner)

[24] Before dealing with the issues, we would like to refer to excerpts of minutes which we find have relevancy in respect of the issues. The first is the minutes of the Board of Directors' meeting held on 18 June 2003 where the bank had given notice to withdraw the banking facilities given to the 1st respondent. In Agenda 6 it is stated:

> The Chairman remarked that the Corporate Guarantee provided by the shareholders in respect of the banking facilities offered by HSBC should be proportionate to their shareholding.
>
> Ms Kat Yong reported that HSBC offered facility of RM2.0 million to be secured by corporate guarantee of RM12.0 million from Ngiu Kee Corporation Berhad (NKC) and RM3.6 million from Pan-Pacific Construction Holdings Sdn Bhd (PPCH). She added that HSBC refused to reduce the quantum of the corporate guarantee.
>
> In view of the foregoing, the Chairman asked on behalf of PPCH whether NKC would be willing to counter indemnify PPCH for amount exceeding RM600,000.00 (i.e. their 30% portion).
>
> Datuk Mazelan on behalf of NKC confirmed that NKC is willing to counter indemnify PPCH.
>
> The Chairman requested for time until the end of this week to sort out this issue with PPCH's Head Quarter in Taiwan.
>
> Ms Kat Yong reported that the Company has applied for RM6.0 million facility from BIMB for the purpose of repaying HSBC and 'will eventually transfer the whole account to BIMB'. She added that BIMB is still considering the Company's application. She further reported that BIMB provides C.I.T. security services to the Company free of charge versus RM1,800.00 monthly charged by HSBC.
>
> The Chairman reminded the Management that the operation of the Account should be in line with the JV Agreement.

[25] From the minutes and the correspondence tendered as exhibits, it is clear that the 2nd respondent had been threatened by the bank in respect of the banking facilities already given to the Company. The Board was also informed that the HSBC was willing to continue the banking facilities on condition that the 2nd respondent and the petitioner provide additional security. As can be seen the 2nd respondent was willing to provide the additional security and also agreed on the request by the petitioner to indemnify the petitioner in respect of the petitioner's share of additional security and yet the petitioner was not ready to give the undertaking, on the excuse that the Chairman on behalf of the petitioner had to refer the matter to its headquarters in Taiwan. It is clear to us that the petitioner was not willing to take any risk but to enjoy all the benefits under the JV.

[26] Further down the minutes in Agenda 7 and Agenda 8 it state as follows:

> AGENDA 7
>
> AMOUNT OWING TO/FROM RELATED COMPANIES:
>
> Ms Kat Yong briefed the Board on the amount due from related companies of which the breakdown analysis is presented in Appendix 6 of the Board Paper.
>
> The Board noted this information and will decide on the treatment of this accounts after the Management has verified these accounts together with the Auditors and report to the Board.
>
> AGENDA 8
>
> ADVANCES FROM NGIU KEE GROUP
>
> The Board noted this information that as at 31 May 2003 the Ngiu Kie Group has advanced RM3.78 million to the Company for the repayment to its suppliers.

[27] At the Board of Directors' Meeting the minutes of the meeting shows the following:

> Agenda 4 BANKING FACILITIES WITH HSBC BANK MALAYSIA BERHAD, KOTA KINABALU (HSBC)

Ms Kat Yong reported that HSBC has reduced the Company's banking facilities from RM6 million to RM3.12 million. Tan Sri Lau also helped by granting his personal guarantee for RM1 million as additional security for the HSBC facilities. Furthermore, HSBC requires the Company to make full settlement by 29 February 2004.

Datuk Chairman, on behalf of the Board, recorded a note of thanks to Tan Sri Lau for granting his personal guarantee and endorsed his generosity.

Tan Sri Lau expressed his concern over the Company's cash requirement of approximately RM6 million, and finding ways to resolve the cash requirements whilst the Company's profit level in not there.

Mr. Kung commented that unless the Company improves on its profitability, he is doubtful on the ability of the Company to continue surviving.

Ms Kat Yong reported that the Company shall continue to source for banking facilities from other banks. She added that barring unforeseen circumstances NKC's right issue should be completed by January/February 2004. By then, NKC would be in a position to assist the Company financially.

...

Agenda 6 MONTHLY MANAGEMENT ACCOUNTS AND BUDGET FOR SEPTEMBER TO DECEMBER 2003

The Board noted that the monthly management accounts have not been submitted to the Board Members regularly and in time for the management committee meeting.

Tan Sri Lau commented that the monthly management accounts and Board Papers should be distributed to the Board Members well in advance to enable them to consider the subject matter in advance.

At this juncture, Mr. Louis Phung (Mr. Louis), the Accountant, was invited into the Meeting Room.

Ms Kat Yong briefed the Board on the Budget for September to December 2003. She reported that the Company's performance to date is better than last year and quite close to the management budget.

Ms Kat Yong also highlighted the finance costs of RM450,260 charged by NKC being interests on outstanding amount due to NKC. She informed the Board that she has instructed the Management to prepare a breakdown of the finance costs.

Mr. Cui-chih (Mr. Chou) queried on the following:

(i) What is the portion of NKC's facilities being used by the Company.

(ii) Whether there is any formal loan agreement between NKC and the Company?

(iii) What is the interest rate charged on the finance from NKC?

(iv) Why is the board's approval on the above not sought?

Tan Sri Lau remarked that transactions involving finance and interest chargeable should be subject to the Boards' approval. He pointed out that clause 4.4.2 of the Joint Venture Agreement provides that advances by the joint venture partners, are subject to the prevailing banking interest rate for overdraft facilities/term loan facilities to be agreed between the shareholders. He added that exceptional items such as the aforesaid finance costs charged by NKC should be verified and confirmed by the Company's auditors and that the Shareholders' approval should be obtained in accordance with the Joint Venture Agreement.

Mr. Kung requested for the management report on the floor plan counters performance to be extended to him for his perusal and comments. In response, Ms Kat Yong instructed Mr. Liew to provide the requested information to Mr. Kung.

Mr. Liew reported that as of 25 September 2003, the total actual sales for September is RM2.2.million and the Management is targeting at RM3.0 million sales by end of September 2003. He added that the staff sets sales target for year 2003 at RM43 million but the HQ has increased the target to RM46 million. He also reported that due to tight cash flow, the Company has been delaying payments to suppliers and hence faced difficulty in obtaining merchandise from suppliers. He also explained that one of the reasons the Company was not able to meet the sales target last year was due to the withdrawal of certain items from sale rather than to do so below costs.

Mr. Kung sought clarification on the 1% Management Fees charged by NKC without evidence of providing proper management. Ms Kat Yong explained that these fees are in respect of the share of Costs incurred by NKC on the Group's

MIS Dept outsourced, centralised purchasing, internal audit functions outsourced and centralised internal audit functions. She added that the Company paid the least HQ expenses shared by all stores.

Tan Sri Lau commented that a cost vs benefit analysis on the Management fee charged should be computed and presented to convince the other joint venture partner. He also suggested that future budget be prepared up to February the following year instead of up to December for the year. He further emphasized that the Company should set objective to recoup the share capital of the Company in three (3) years' time ie by the year 2006.

Agenda 7 OUTSTANDING RENTAL FOR JULY AND AUGUST 2003 OF RM387,543.87

Ms Kat Yong reported that HSBC shall release RM1 million by next week. The fund shall be used to pay suppliers and consigners so as to facilitate new merchandises to come in to meet the October sales requirement.

Tan Sri Lau proposed that the Company consider payment to landlord after the Chinese New Year 2004. He further suggested that the Board appeal to the Landlord for consideration.

Mr. Kung remarked that pursuant to the Tenancy Agreement, if the Company fails to pay three (3) months rental due then the Company would have breached the Tenancy Agreement. He added that the company should give confidence to the Landlord by demonstrating its ability to pay the rental and to safeguard the tenancy.

Datuk Chairman commented that the rental is based on the percentage of sales and late payment interest on outstanding rental shall be charged by the Landlord according to Agreement. The Board recorded that the Company shall be putting the sublease at risk should the Company delay payment of rental after the Chinese New Year 2004 as the outstanding rental by then would be for 8 months equivalent to approximately RM1.6 million.

...

Agenda 10 AMOUNT OWING FROM RELATED COMPANIES OF RM620,124 AS AT 31 DECEMBER 2002.

Datuk Chairman expressed his concern over when the related companies would settle the long outstanding amount due to the Company.

A Ms Kat Yong remarked that it remains a business decision made even though merchandise bought from Taiwan were not sellable. Therefore, respective stores would have to absorb their respective portion of the costs. However, she felt that the Company should absorb the salaries of Mr. Robert Tan who was then employed under the Advertising and Promotions Department of the Company.

B

Mr. Chou requested that the Management write to the respective related companies for payment or else to charge interest on the outstanding amount.

C

Tan Sri Lau requested that a consolidated report on the amount due from the related companies be presented to the Board. He then proposed that NKC to decide either:

(i) to off set the amount due from the related companies against the outstanding amount due to NKC; or

D

(ii) to repay the Company.

The Board agreed with Tan Sri Lau's proposal.

E Agenda 11 ADVANCES FROM NGIU KEE GROUP OF RM3.78 MILLION

Datuk Chairman remarked that the Board has in the last meeting requested for details of the advances from Ngiu Kee Group but still not received yet.

F

Mr. Liew and Mr. Louis were then instructed to provide the requested details to the Board.

At the proposal of Tan Sri Lau the Board agreed that the Company's external auditor be requested to verify and confirm the advances from Ngiu Kee Group in writing.

G

[28] At the Board of Directors meeting that took place on 17 November 2003 the minutes show the following:

Agenda 2

H

(iii) STOCK LOSS OF RM775,000/-

Ms Kat Yong respond that Messrs Ernst & Young ("EY") has quoted a fee of RM40,000/- on the proposed verification of the stock Loss (RM775,000/-) and Advances from Ngiu-Kee Group (RM3.78 Million). The Board is of the opinion that the fee quoted by EY is too high.

I

The Board unanimously RESOLVED the following:

(a) The Management be instructed to request EY to include the verification on the aforesaid Stock Loss and Advances from Ngiu-Kee Group as part and parcel of the forthcoming annual audit for the financial year ending 31 December 2003 subject to a fee which is acceptable by the Board.

(b) If the fee on the verification asked by EY is too high, another independent audit firm, subject to the mutual agreement of the Joint-Venture ("JV") partners, shall be appointed to carry out the aforesaid verification.

Agenda 3 BANKING FACILITIES WITH HSBC BANK MALAYSIA BERHAD (HSBC) KOTA KINABALU

Ms Kat Yong informed the Board that HSBC shall be withdrawing facilities on 29 February 2004. The Management is still looking for facilities from other banks and working towards paying off RM3.0 Million to HSBC.

She added that the existing Bank Guarantee ("BG") facility from HSBC of RM120,000/- against Fixed Deposit in favour of Sabah Electricity Sdn Bhd which is secured by a cash deposit of RM120,000/- shall be cancelled by 15 December 2003. She suggested that upon cancellation the BG facility be transferred to other bank to establish some new banking relationship.

The Board agreed that upon cancellation of the existing BG facility from HSBC, the Company shall approach Bank Islam Malaysia Berhad for a new BG facility of RM120,000/- against Fixed Deposit in favour of Sabah Electricity Sdn Bhd and that authority be hereby given for any two of the directors to sign, for and on behalf of the Company, the necessary application documents relating thereto.

Agenda 7 INTERESTS CHARGED BY NGIU KEE SDN BHD

Ms Kat Yong briefed the Board on the computation of interest charged by NKSB on the advances to the Company. She explained that the 3% charged by Maestro Product Sdn Bhd as commission is actually for freight charges incurred on centralized purchasing.

Mr. Chou questioned why the interests charged by NKSB have not been taken up in the Company's audited accounts for the years 2001 and 2002.

Ms Kat Yong replied that the Management has overlooked to take into account the interest chargeable on advances in the Company's account for the years 2001 and 2002.

Tan Sri Lau pointed out that clause 4.4:2 of the Joint-Venture Agreement ("JVA") provides that advances by the JV partners are subject to the prevailing banking interest rate for overdraft facilities/term loan facilities to be agreed between the shareholder. He added that the interest charged should be based on the actual quantum advances to PNK at the proposal of Tan Sri Lau. The Board RESOLVED that the Management be instructed to prepare a detail breakdown on the quantum financed by NKSB and the interest computation for the Board to consider and decide on whether to accept or reject the proposed prior year adjustments relating thereto.

Agenda 8 REPORT STOCK LOSS OF RM775,000/-

The Board agreed to defer the subject pending the report by an independent audit firm.

Agenda 9 REPORT ON ADVANCE FROM NGIU-KEE SDN BHD ("NKSB")

The Board agreed to defer the subject pending the report by an independent audit firm.

Agenda 11 PROPOSAL TO OBTAIN MEMBERS' APPROVAL ON AUTHORITY FOR DIRECTORS TO ISSUE SHARES

Ms Kat Yong informed the Board that the company needs RM3.0 million for repayment to HSBC and another RM3.0 million for working capital and the Management is requesting for rights issue.

Datuk Chairman recalled that in the last Board Meeting, the Board Members spoke on continuing to source for banking facilities from other banks and looking forward to some financial assistance from Ngiu Kee Corporation Berhad's ("NKC") rights issue. He further suggested the Board to wait until all avenues be exhausted before rights issue by the Company be considered.

Ms Kat Yong remarked that NKC is raising the Rights Issue for its Group. She added that the Company is merely 70% owned by NKC whereas other subsidiaries are 100% owned by NKC. Hence NKC may only assist the Company to the extent of 70% of which is still subject to the approval of the Board of NKC. She further added that in any event, NKC cannot afford to allow

the Company to default the bank, otherwise the banking facilities of the whole NKC Group would be affected and hence with or without Rights Issue NKC would still he supporting PNK.

At this juncture Datuk Chairman reminded all members of the Board to refrain from saying anything which they do not mean at this meeting.

Mr. Kung expressed his concern over the future of the Company and the inability of the Company to give confident to the shareholders on its ability to generate profit and hence unable to convince the shareholders to pump in more capital into the Company.

Tan Sri Lau remarked that the Management should try to convince both the Board of Directors and the shareholders by presenting a detail proposal paper setting out a comprehensive plan which include a schedule on how and when the shareholders can recoup their capital investment. Mr. Kung agreed with Tan Sri Lau on the Management to supply the shareholders with more information.

Datuk Chairman remarked that the Company put into effect the decision of the shareholders. He suggested that the shareholders get together and discuss first before going to the Board. Tan Sri Lau agreed that the shareholders have a discussion among themselves first.

The Board finally agreed that the shareholders shall have a separate meeting on the proposed rights issue.

[29] Let us now turn to the issues:

(1) RM3.78 million loan and interest charged

[30] The advance of RM3.78 million to the 1st respondent from the Ngiu Kee Group was first raised at the Directors Meeting which took place on 18 June 2003. It was explained at that meeting that the advance was necessary in order to repay the suppliers. The suppliers had indicated that supply of the goods ordered by the 1st respondent would be stopped if no payment was made. The respondents claimed that they did thus in accordance with cl. 4.4.2 of the JV Agreement which provides:

Any additional finance required by the Company may be advanced by the parties subject to the prevailing banking interest rate for overdraft facilities/term loan facilities to be agreed between the Shareholders.

[31] We take note that when this advance was made, the 1st respondent was facing financial difficulties because the bank threatened to reduce the overdrafts and subsequently to withdraw all the financial facilities. The bank also required the 1st respondent to give additional security. As we have said earlier, the 2nd respondent was agreeable to give the additional security but not the petitioner despite the fact that the 2nd respondent was willing to indemnify the petitioner in respect of the petitioner's share of additional security. For that reason, the bank withdrew the financial facilities in stages. Indirectly, the petitioner was not willing to contribute additional fund or to secure continuation of the bank's financial facilities when the petitioner knew that the 1st respondent was hard-pressed for funds. It is clear to us that in addition to paying the suppliers, the respondents had to pay the rental of the business premises, the large amount of electricity bills and the administrative expenses. Even the request by the 1st, 2nd and 3rd respondents for the petitioner to ask the landlord (the petitioner's subsidiary) to withhold or reduce the rent was refused. The Chairman, speaking on behalf of the petitioner, said that the rentals must be paid in accordance with the JV Agreement. The petitioner only suggested that the 1st respondent looked into other banks for its financial facilities which the 1st respondent had done but was not successful. We would not be wrong to say that the petitioner wanted the 1st respondent to go bust.

[32] It was in this situation that the 2nd respondent advanced the RM3.78 million to float or assist the 1st respondent. It is easy to understand why the 2nd respondent was willing to do so, because it wanted to save its 70% investment. In our view, this was not an oppressive act by the 2nd respondent, but rather an oppressive act by the petitioner in particular the Chairman, Dato' Lo.

[33] At the Board of Directors meeting that took place on 17 November 2003 the members (including the directors from the petitioner) unanimously agreed that the management of the 1st respondent be instructed to request auditors to include the verification of the said advance of RM3.78 million and the alleged stock losses as part and parcel of the forthcoming annual audit for the financial year ending 31 December 2003. There was a delay in instructing the auditors due to the fact that at the beginning the board members felt the fees requested by the auditors were

on the high side. Eventually the auditors agreed to do the verification on an agreed fee. The "Report on Verifications of Stock Loss and Advances from Ngiu Kee Sdn Bhd" was completed on 17 September 2004. It is interesting to note that even before the report was completed the petitioner proceeded to file the present petition. This was completely against the board's unanimous decision to wait for the report before any action could be taken. The evidence shows that according to the auditor's report, the stock loss and the advance had been verified and there should not be any more grievances by the petitioner. Instead of waiting for the auditor's report to be finalized, the petitioner filed the present petition. In our view, when the petitioner filed the petition, it was a total disregard of the unanimous decision of the Board of Directors and total disregard of the parties' interest.

[34] The "Report on Verifications of Stock Loss and Advances from Ngiu Kee" confirmed and reported that in the accounts of the company the sum of RM2,921,157.21 out of the alleged sum of RM3,782,523.65 was accounted for leaving only the difference of RM861,366.35 unverified. As can be seen this unverified difference was explained at the Board of Directors' meeting of the company held on 10 November 2005 (pp. 1315-1318 of the Record of Appeal Vol. 5).

[35] Though this piece of evidence was adduced during the trial by Mr. Liew, the petitioner did not make any issue on this reconciliation during the trial. The petitioner did not cross-examine Mr. Liew on this explanation of reconciliation. For that reason, learned counsel for the respondents submitted that the petitioner had regarded it as non issue and that difference, ie, the unverified amount of RM861,000 had been reconciled.

[36] The learned judge in his judgment in respect of this reconciliation said:

> ... The report was of the view that of the alleged RM3.78 million loan, the sum of RM861,366.35 was not supported by any verifiable documents. But it was recorded in the minutes of the Company's board meeting held on 10 November 2005 that Liew Tuck Wah, the area manager of the Company, "had furnished all the documentation to Ernst & Young to provide him with a written confirmation that the amount of RM861,000/- had been reconciled in the year 2004". When Liew Tuck Wah testified, he

was not questioned as to his said assertion in the board meeting that the sum had been reconciled and as to how it was reconciled. What is established at most was that there was some accounting deficiency, in that credits and debits were raised without the usual consent or the necessary supporting documents, and not that there was any attempt on the part of any of the Respondents or any of them to inflate the amount of the indebtedness so as to siphon the money of the Company away. It was not suggested to any of the witnesses who testified on behalf of the Respondents and neither did the auditor's report so suggest. However, whether the sum of RM861,000 had been reconciled as asserted by Liew Tuck Wah depends very much on the auditor's confirmation for which Liew Tuck Wah was supposed to obtain for tabling at the next board meeting. There is no evidence as to whether the auditor will or will not confirm the reconciliation. Given the manner in which the accounts were kept and kept by the same internal accountant working for the Company, the 2nd Respondent and another company called Maestro Products Sdn Bhd, the Petitioner was *justified in being suspicious and for feeling that something was amiss which the auditor confirmed.* I am not unaware that the Company was already given the opportunity to explain and had in fact attempted to explain by supplying the documents through their letter dated 22 April 2004 as noted by the auditor but fail to do so. If Liew Tuck Wah's assertion that the account had been reconciled is true and confirmed by the auditor, that would be the end of the matter. If it cannot be reconciled and an auditor so say, it would mean that what was asserted by Liew Tuck Wah at the meeting was a ruse to get out of the situation and made for the purpose of defeating the petition; if it is such a ruse, it could only work for now but cannot defeat a subsequent petition based on the failure to reconcile the account because the failure worked to the advantage of the 2nd and 3rd Respondent, it being that Maestro Products Sdn Bhd is a company under their control. *For the present, the manner, described earlier, in which the accounts had been maintained do make out a prima facie case that they had been kept to the disadvantage of the Company and thus to the detriment or disregard of the interests of the Petitioner.* …

[37] It is clear to us that the learned judge had committed an error in coming to the conclusion against the weight of evidence before him. In its petition, the petitioner claimed that the sum of RM861,000 had not been verified. The onus is on the petitioner to satisfy the court that the amount had not been verified. In our view, mere suspicion or deficiency in keeping the accounts of the business is not enough. The petitioner has to prove that the amount was never verified and that there is evidence to show that

the amount had been siphoned out of the company (1st respondent) for the benefit of the 2nd respondent. For that reason, we are of the view that the petitioner failed to prove that the amount have not been verified or the 2nd respondent had abused or misused the fund for the 2nd respondent's benefit.

[38] The interest charged on the advance of RM3.78 million made by the 2nd respondent was also an issue raised by the petitioner. The learned trial judge found the issue in favour of the petitioner. As can be seen from the minutes of the Board of Directors meeting, the rate of interest charged was explained in that the interest charged was 2.5% above BLR. This was more or less the amount charged by a bank. The Chairman (Dato' Lo) being the principal representative of the petitioner who appeared as witness (DW1) in the course of cross-examination agreed that the interest charged on the advances had been resolved by the 1st respondent and that the 1st respondent agreed to pay the interest at that rate. He could not say otherwise because at the Board of Directors meeting held on 2 December 2002 which he chaired the board unanimously agreed that the interest is payable on the advances to be obtained from the shareholders. In our view, the learned judge erred in making an issue on this when the parties had agreed to it.

[39] For the reasons we have stated above, we find that the petitioner failed to prove that the advances of RM3.78 million and the interest had oppressed the petitioner or that they have the effect of disregarding the interests of the petitioner. On the other hand, we find the advances were done to help the company of which the petitioner is a shareholder.

(2) Company Paying Salaries Of Three Staffs Of 2nd Respondent

[40] The respondents admitted during the Board of Directors' meetings of paying the salaries of three staff members of the 2nd respondent. The respondents did not hide this fact from the Board of Directors. The explanation for paying them was given during the meeting. This is found at the Board of Directors' meeting held on 6 September 2002. In that meeting it was explained that the three staff members were stationed in the central purchasing office so that they could help identify goods ordered by the 1st respondent. It is not disputed that other outlets have placed members of their staff in the central purchasing

office in Kuala Lumpur and they were paid by the different outlets. Placing the three staff members had benefited the 1st respondent. For that reason, the salaries of the three staff members were paid by the 1st respondent. The Chairman (Dato' Lo) admitted that this arrangement had benefited the 1st respondent.

[41] Taking into consideration that the payments were revealed to the shareholders and they were made openly and not in secret and also the fact that it was discussed during the Board of Directors' meeting to which the Board had accepted, we fail to see how these payments could be oppressive. Further, the Board of Directors accepted the fact by paying the three staff members who were in the central purchasing office, in 2001 alone the 1st respondent had saved RM1.8 million. Admittedly, the payments might be wrong but it could not be said to be oppressive. These payments are somewhat similar to payments made in *Re Kong Thai Sawmill (Miri) Sdn Bhd (supra)* where it was held that those payments were not oppressive of the minority of the shareholders. In that case the situation is worse because the minority shareholders were not in the board. In the present case, the petitioner's representatives were in the board and one of them was and still is the Chairman of the board. Anyway, it was in evidence that this practice had stopped.

(3) Using Company's Staff To Look After Lawas Store Of 2nd Respondent

[42] The respondents admitted that a member of the 1st respondent's staff (an accounts clerk) was used to look after the Lawas store and he was paid by the 1st respondent. The Managing Director (DW2) admitted during the board's meeting and at the trial that it was wrong to do so and had stopped this. She had instructed the Lawas store to make restitution of the salaries paid to that member of the staff.

[43] Since this issue was raised during the board's meeting and during the trial where DW2 admitted it was wrong and she had stopped the practice and requested for restitution from the Lawas store, we are of the opinion this does not amount to oppression.

(4) Whether The Learned Judge Was Right In Making The Order That The Majority Shareholder (The 2nd Respondent) Has To Sell Its Shares To The Minority Shareholder (The Petitioner)

[44] The learned judge after finding that the 2nd and 3rd respondents had oppressed the petitioner made the order that the 2nd respondent to sell all its 70% shareholding in the company to the petitioner. There is no dispute that in the present appeal the 2nd respondent is the majority shareholder holding 70% of the company paid-up capital while the petitioner is the minority shareholder in the company. The learned judge in making that decision stated:

> Winding up the petitioner is out of the question since it is a going concern and employ a sizeable number of workers and since all the parties feel that they can make the company a profitable concern. Though it did cross my mind that perhaps the petitioner should sell the shares to the 2nd respondent but that would not only be condoning oppressive conduct or conduct in disregard of the interest of the petitioner but also allow them a reap an advantage out of their questionable conduct, including enjoying the continued benefit of special rent of the premises occupied by the company and which belonged to a subsidiary of the petitioner. That option is also out. That leaves only the viable option of the petitioner buying over all the shares of the 2nd respondent in the company. Therefore, I order that the 2nd Respondent shall sell all its shares in the Company to the Petitioner at a fair and commercial price to be determined by Ernst & Young, a firm of auditors, which price shall be determined within 30 days hereof and the sale to be concluded within 30 days thereafter. ...

[45] First of all, we agree with the learned judge that the order to wind up the company is out of the question since it is an ongoing concern. The only issue is the selling of the shares by the majority to the minority.

[46] The authorities cited by the parties show in most cases the order of sale would be from the minority to the majority and not otherwise. In Malaysia the authorities show it is the minority shareholders who should sell their shares to the majority shareholders when they have shown that they have been oppressed or the majority shareholders have disregarded the minority shareholders. Except for the present petition, as ordered by the learned trial judge, the authorities in Malaysia show that it was for the minority to sell their shares to the majority. (See

Edmund Charles Liebenberg v. ICB-Griffin Manufacturing Sdn Bhd & Ors [2005] 3 CLJ 613; *Ting Teck Sie v. Wong Sen Chiew & Ors* [2005] 6 CLJ 495; *Liew Teck Fook v. Chan Yip Pooi & Ors* [2005] 5 CLJ 20; *Tan Kian Hua v. Colour Image Scan Sdn Bhd & Ors* [2004] 6 CLJ 174; *Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors* [1998] 3 CLJ Supp 126; *Lee Chee Onn v. Lee Keng Soon & Anor* [1994] 3 CLJ 461; and *Chiew Sze Sun & Anor v. Cast Iron Products Sdn Bhd & Ors* [1994] 1 CLJ 157).

[47] Coming to the present appeal, as we have stated earlier, the disparity shareholding between the parties is so great that it would create total injustice to the 2nd respondent holding 70% of the paid-up capital in the 1st respondent to sell their majority shareholding to the petitioner. Anyway, as we have said earlier, the petitioner failed to prove oppression or disregard of its interest by the 2nd respondent. If the petitioner had proved oppression or disregard of its interest, the fair order should be for the petitioner to sell their shares to the 2nd respondent and not otherwise.

Conclusion

[48] As stated in the case of *Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd (supra)*:

1. For the petitioner to succeed in his application for the said reliefs, he must show that it was the affairs of the company which were being conducted in an oppressive manner, and that the respondent company had oppressed the minority shareholders which in this case is the petitioner.

2. On the whole, the circumstances and matters complained of by the petitioner did not at all denote that there was oppression within the meaning of s. 181(1) of the Act. There was nothing to show that the 2nd and 3rd respondents' action complained of was designed to injure the petitioner in its rights as a member. The petitioner had failed to prove that the directors representing the respondents had acted in disregard of the petitioner's interest. There was nothing to suggest that the company was not being conducted efficiently by the existing board of directors in the interests of the members, neither was there any violation of the conditions of fair play or any abuse of power being committed by the directors of the respondents which could amount to oppression. Oppression must be in the form of dishonesty and in the instant case, there was none.

[49] Having gone through the evidence made available in the record, we are of the view that the acts of the 2nd and 3rd respondents as stated by the learned trial judge were not sufficient to prove that the petitioner, being a minority shareholder, had been oppressed. There is also no evidence to show that the directors representing the 2nd respondent in the 1st respondent had acted in disregard of the petitioner's interest. As can be seen from the minutes of the Board of Directors meeting, the directors representing the 2nd respondent had been very accommodating to the directors representing the petitioner in answering and explaining the issues raised by he directors representing the petitioner. The directors representing the 2nd respondent had not brushed aside or refused to discuss the issues raised by the directors representing the petitioner.

[50] For the above reasons, we could not find any merit on the issues raised by the petitioner. We hereby allow the appeal by the 2nd and 3rd respondents and dismiss the petitioner's petition with costs here and below. The petitioner is to bear the costs on their own and not from the 1st respondent's fund. The deposit is to be refunded to the 2nd and 3rd respondents who are the appellants in this appeal.